92-1181

Supreme Court, U.S.
FILED
DEC 1 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992
(RECORD #)

BARNEY L. BYRUM, et. al.,
Petitioners,

v.

BEAR INVESTMENT COMPANY, et. al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS

I

CAN THE LAW OF THE FORUM, IN A DIVERSITY CASE UNDER 28 USC § 1332, BE IGNORED BY THE UNITED STATES FOURTH CIRCUIT COURT OF APPEALS, VIZ., VIRGINIA'S LAW OF SETTLEMENTS, WHEN A SETTLEMENT WAS UPHELD BY STATE AND FEDERAL TRIAL COURTS AND THE SETTLEMENT WAS ONE AS A MATTER OF VIRGINIA LAW; AND IN SO DOING IN A SUIT TO ENFORCE THE SETTLEMENT AND SEEK DAMAGES, REACH AN EGREGIOUS RESULT TOTALLY CONTRARY TO STATE LAW AND THE EVIDENCE AND CONTRARY TO FRCP 8 and 56, THEREBY DENYING THE PETITIONERS BYRUM A TRIAL UNDER THE SEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION 11 OF THE CONSTITUTION OF VIRGINIA.

II

UNDER THE FACTS OF THIS CASE, CAN THE UNITED STATES FOURTH CIRCUIT COURT OF APPEALS PANEL IGNORE FEDERAL RULES OF CIVIL PROCEDURE, FRCP RULE 8 AND RULE 56, TO REACH A FUNDAMENTALLY UNFAIR RESULT WITHOUT A TRIAL ON THE CONTROVERTED ISSUES SO AS TO NOT VIOLATE THE FRCP 56; AND CAN THE PANEL OF THE FOURTH CIRCUIT IGNORE FRCP 8 THAT AFFIRMATIVE DEFENSES MUST BE PLEADED IN RESPONSIVE PLEADINGS AND REACH AN EGREGIOUS RESULT CONTRARY TO THE LAW OF THE FORUM AND IN VIOLATION OF THE FRCP RULE 8.

PARTIES TO THE PROCEEDINGS

The Petitioners are Barney L. Byrum and Elizabeth Y. Byrum, husband and wife, and their two sons, Barney L. Byrum, III, and Spencer N. Byrum, the latter son being medically incompetent and represented by his father, Barney L. Byrum, guardian. The Petitioners are residents and domiciled in the State of Maryland.

The Respondents, all Virginia Residents and a Virginia partnership, are Bear Investment Company, a Virginia partnership, W. W. Whitlock, agent, principal, W. W. Whitlock Agency, Inc., general partner, Edward J. Whitlock, Robert A. Whitlock, Albert G. Johnson, partners, and W. W. Whitlock, agent and personally.

TABLE OF CONTENTS

	PAGE/S
THE QUESTIONS PRESENTED FOR REVIEW	i - ii
THE PARTIES TO THE PROCEEDINGS	iii
TABLE OF CONTENTS	iv - v
TABLE OF AUTHORITIES	vi - ix
OPINIONS BELOW	1 - 2
JURISDICTION	2 - 3
Date of Judgment	3
Order on Rehearing	3
Statutory Provision Conferring Certiorari Jurisdiction	3
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3 - 7
STATEMENT OF THE CASE	7 - 27
BASIS FOR JURISDICTION OF FEDERAL DISTRICT COURT	3 - 5
REASONS FOR ALLOWANCE OF WRIT	27

TABLE OF CONTENTS
(Continued)

	PAGE/S
I. Reason for Granting the Writ.	27
II. Law and the Argument	27 - 43
CONCLUSION	43 - 46
SIGNATURE	46
APPENDIX	1 - 165

TABLE OF AUTHORITIES

PAGE/S

Adickes v. Kress & Co 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 (1970)..... 34

Bangor-Punta Operations, Inc. v. Atlantic Leasing, Ltd. 215 Va. 180, at 183, 207 S.E. 2d 858, at 860 (1974) 40

Commissioner v. Estate of Bosch 387 U.S. 456, 18 L Ed 2d 886, 87 S. Ct. 1776 (1967) 31

C & O Ry. Co. v. Mosby 93 Va. 100, 24 S.E. 918 (1896)..... 40

TABLE OF AUTHORITIES
(Continued)

PAGE/S

Dagounakis v. The Santa Madre 183 F. Supp. 54 (E.D. Va 1959 aff'd 277 F. 2d 461 (4th Cir. 1960.)..... 40

Eggleston v. Crump 150 Va. 414, 418-419, 143 S.E. 688 (1928)..... 39, 40

Erie Railroad Co. v. Tompkins 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)..... 31

Henderson v. Foster 139 Va. 543, 124 S.E. 463 (1924)..... 43

TABLE OF AUTHORITIES
(Continued)

PAGE/S

Mosby v. Leeds 3 Call (7 Va.) 437 (1803)..... 39

Stevens v. Howard D. Johnson Co. 181 F. 2d 390, 394 (4th Cir. 1950.)..... 34

Virginia Shipbuilding Corp. v. United States Shipping Board 292 F. 440 (E.D. Va. 1923.)..... 40

West v. Costen 550 F. Supp. 564 (W.D. Va. 1983.)..... 33

Zane's Devisees v. Zane 6 Munford (20 Va) 406 (1819)..... 39,40

TABLE OF AUTHORITIES
(Continued)

CONSTITUTIONAL

AND

STATUTES

	PAGE/S
TITLE 28 UNITED STATES CODE,	
SECTION 1254	3
AMENDMENT VII	3
28 U.S.C. §1332.....	4
FRCP RULE 8 (c) & (d).....	4 - 5
FRCP RULE 56 (a) & (b).....	5 - 6
THE VIRGINIA CONSTITUTION,	
ARTICLE I, SECTION II.....	6 - 7

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, Barney L. Byrum, Elizabeth Y. Byrum, Barney L. Byrum, III, and Spencer N. Byrum, each respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on AUGUST 10, 1992. (Appendix pages 4 to 19 .)

OPINIONS BELOW

The "unpublished" per curiam, opinion of the United States Court of Appeals for the Fourth Circuit is set out in the Appendix at Pages 4 through 19. The memorandum and Final Order of the District Judge entered December 3, 1991 is set out in the

Appendix at Pages 20 through 49 .

For purposes of this Petition, the United States Fourth Circuit panel published opinion first reversing the district court below and remanding this same matter to the District Judge for further proceedings is found at Appendix pages 50 to 66.

GROUNDS FOR JURISDICTION

The judgment sought to be reviewed is dated and was entered August 10, 1992 by the United States Court of Appeals for the Fourth Circuit from a second appeal to the district court granting to the petitioners for the second time a summary judgment on the issue of a settlement contract being in existence under the law of the forum.

The second decision of the appeals panel again reversed and entered summary judgment for the Respondents.

The Petition for Rehearing and A Suggestion for Rehearing In Banc was denied and entered September 2, 1992. (Order at Appendix 1-3 .)

Title 28 United States Code, Section 1254 confers jurisdiction to review the judgment by writ of certiorari if filed within ninety days of the final decision which was rendered on the Petition to Rehear (with a suggestion of an en banc hearing) September 2, 1992, denying the same.

THE CONSTITUTIONAL PROVISIONS AND STATUTES AND RULES INVOLVED

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

28 U.S.C. §1332

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between: Citizens of different states.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 8. General Rules of Pleading

(c) **Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of

limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments is a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

RULE 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim,

counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

THE CONSTITUTION OF VIRGINIA

§11. Due process of law; obligation of contracts; taking of private property;

prohibited discrimination; jury trial in civil cases. - That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts...

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five. (Emphasis added.)

STATEMENT OF THE CASE

[NOTE: APP shall mean "Appendix" to this Petition. Underlined or bold portions of text are emphasis added.]

For the Byrums, this is the Court of last resort after nearly fourteen years of litigation over their

Virginia farm purchased in the 1950s which they sought to retrieve by a negotiated settlement from their former attorneys and the Bear Investment Company, principal partner being their former counsel, W. W. Whitlock. The Byrums first attorney took the Byrums farm under a fee arrangement so to secure his "future" fees back in 1975. A controversy erupted and he sold the farm for his fees in 1979.

A trial Court in the state court and a trial court in the federal judiciary both held during the years of litigation that the Byrums had entered into a settlement contract under Virginia law to retrieve their land from a forced auction promoted by their former lawyer, John C. Lowe, a Virginia lawyer. (In the state proceeding on the trial of whether or not a settlement contract formed, the state trial Court so holding

one did form in two separate bench trials, the state Supreme Court reversed the state trial judge's decision on purely jurisdictional procedural grounds.) Under Virginia law, the Byrums had the right to an independent action on the asserted settlement regardless of this decision.

The Byrums, the parents, had moved to Maryland where their children resided. Re-filing before the federal judiciary under the diversity statute and the land being situated in Louisa, Virginia, the United States Fourth Circuit panel reversed the federal trial judge's second bench decision that a settlement had occured as a matter of forum law. (The contract had formed in Virginia between the parties over the land auction to redeem the same for cash consideration and a specific release of the respondents.)

The panel misunderstood and misapplied questions of state law ignoring also procedural pleadings under the Federal Rules of Civil Procedure that failed to raise an affirmative defense of payment required by FRCP 8. The Byrums' Amended Complaint and the Respondents' Answer can be found at APP pages 67 to 116. Under affirmative defenses, the Respondents do not raise the issue of payment. (APP. page 116-117.)

The Fourth Circuit panel in its second reversal seized upon no-re-tender of a $3,000.00 cashiers check to the Respondents misapprehending the facts and the law of the forum, entered summary judgment for Bear Investment Company who had also filed a motion for summary judgment, and dismissed the Complaint.

In the simplest of terms factually on a complicated case, given

this case's acrimonious and litigious history since 1975, the Petitioners, the Byrums, a family, owned a sizable 137± acres farm in Louisa County, Virginia with a 25 plus acre lake. It has tremendous development potential then and more so today. Its value far exceeds the $28,000.00 auction price and it likely has a million dollar plus value.

In the 1970's, they sought to develop the land under local ordinances for their posterity, it being a lifetime investment of the parents who were represented by attorney John C. Lowe so hired to help get legal passage for development of the family farm. Those legal efforts failed.

As to the land, they also successfully fought in the 1970's and were awarded condemnation compensation

over their farm from a public electrical monopoly, Virginia Power, being represented by another attorney, who succeeded in that regard, namely W. W. Whitlock. Mr. Whitlock, and for his company, would learn of the immense value of the farm from these proceedings and its potential for development.

From 1975 and in 1979, Mr. Lowe and Mr. Whitlock would involved themselves in the sale and purchase of the Byrums' land respectively for a literal song of its true value. Mr. Lowe extracted fees he claimed due him set as to an amount by a secured final state default judgment. Selling the family farm to exact those fees, Mr. Whitlock and his principals would hear of the Byrums' distress with their first lawyer, and would quietly appear to buy the land at Mr. Lowe's commanded

auction conducted on the Louisa County Circuit Courthouse steps.

In the above referenced events, two lawyers would represent their clients' interests respectively and extract legal fees for their services other than from the farm. The first attorney, John C. Lowe, for "future" fees, had previously talked the Byrums, for his future services on two legal matters, into giving him a deed of trust and collateral deed of trust bond on the Virginia farm as security for his "future" legal fees never to exceed "$5,000.00". (APP pages 118 to 131 , the bond).

As would be expected in such a speculative lawyer/client contract for professional legal services, a fee/payment dispute eventually arose between attorney and client on an

accounting demand for what was due and earned. Neither side could agree under the circumstances.

Ultimately, Attorney John C. Lowe would gain his advantage over his clients by securing a final state default judgment, awarded by a state court in the absence of the Byrums, refused to be vacated by that state court, and, refused to be vacated by the Virginia Supreme Court.

John C. Lowe, former lawyer to the Byrums, armed with this state default judgment thus claimed an uncontested fee by a final state default judgment and demanded it be paid in full, <u>with</u> interest. At one point the Byrums put $8,000.00 cash on his desk in a shoe box to settle what they claim to be no more than a $1,500 ± to $4,000 ± dispute. Mr. Lowe refused

to settle. Rather he demanded his default judgment money set by a state court in excess of $12,000.00 be paid in full.

The Byrums, rejecting the exaction of what they believed to be an exorbitant fee with no adversary hearing, next saw Mr. Lowe foreclosed on the Byrums' farm, a lifetime investment. Reaching no accord, Mr. Lowe's professional colleague at the local bar, W. W. Whitlock, former counsel to the Virginia Power condemnation action above so successfully obtained for the Byrums, he being the General Partner of Bear Investment Company, a Virginia Partnership, by its representatives appeared at the auction and bought the farm for $28,000.00 in a non-spirited auction around November 1979.

NOTE: (In a Byrum filed

state chancery suit to upset the auction on many grounds including inadequate price, bad notice, etc..., the land and timber being appraised in excess of $168,000.00 at trial, the Virginia courts upheld the forced auction which sold the land for $28,000.00. The Virginia Supreme Court refused a writ to review the judgment sustaining the auction sale.)

Before and during state litigation over the auction, no money passed to the Byrums hands, deposits were refunded, no deed passed and a deed still hasn't passed pending the outcome of this petition.

The matter has rolled onto litigation up and until this date, 1979-1992, going on 14 years.

After losing all state judicial efforts to regain their farm from their

lawyers and one lawyer's development company, the Byrums beaten to the ground, sought mercy. They begged humbly to their former counsel to exact the terms by which they could regain their land. (The sons of the Byrums had been deeded an interest in the undivided land and during litigation recorded their deed in an effort to preserve their interests.)

In response to the overture by the Byrums to give the farm back, they asked for the Respondents and all participants to name their terms. The three entities involved in the forced auction, the bondholder secured by a deed of trust, Mr. Lowe, the trustee under the deed of trust who sold the property, Mr. Patterson, and the buyer who bought the property, Bear Investment Company, all responded that each and

all agreed that they would jointly settle. Their responses as to the terms are found at APP pages 132 to 143 .

On December 16, 1983, the Byrums sent each a cashier's check and each but one cashed the cashier's check. (APP. pages 132 to 143 .) W. W. Whitlock had also demanded in his letter of options that the Byrums execute a release. He sent none leaving it to the Byrums to prepare and execute a release. They had done so. (APP. pages 127 to 129 .) On each cashier's check and on the release, the Byrums noted that they were doing this "under protest". Mr. Byrum would testify in a state proceeding that this language expressed their unhappiness with the entire matter and not for reserving rights to any future litigation. The

language "under protest", insisted on by the Byrums, would become the Respondents' bone of contention.

However, when the language was eliminated at the Respondents' command, the Respondents refused to perform under the agreement declaring that no settlement was ever formed.

By a letter dated December 20, 1983, (APP pages 154 to 157), Mr. Whitlock returned the cashier's check and demanded that the language "under protest" be stricken from the check and that the Byrums execute a "release" that he had drawn. He would accept the stricken language and his release according to his letter.

A state hearing was held on January 9, 1984 before the Circuit Court of Louisa County. Everyone had endorsed a final state order except

W. W. Whitlock. (APP pages 150 to 153)The Byrums re-tendered the cashier's check to Mr. Whitlock and struck the words "under protest" from the check. (A fact attested to by a witness, A. G. Johnson, from transcript of state proceeding used by the District Court Judge. APP page 20 .) The original release the Byrums had drawn, and signed, in accordance with Mr. Whitlock's instructions, had new language placed on that release, striking "under protest", and noting that they had been "forced" to enter the situation.[1]

W. W. Whitlock for Bear refused the altered release as changed even though the "under protest" language had been stricken both from the check and the release. He handed the re-tendered check of $3,000.00 back to the Byrums even though it had been

[1] App. 127-129

altered as he had commanded,[2] rejecting it again, and demanded that his release drawn by him be executed.

The Byrums were told that they better execute Mr. Whitlock's release by January 18, 1984 or the Court would enter an order finalizing the foreclosure. This admonition was communicated by the trustee's lawyer, Mr. Arnold, APP. pages 158 to 159 .), he now also demanding a release submitted for the trustee be executed. The state court had similarly given an admonition to do what was demanded of the Byrums and told everyone to be back before the state court January 18, 1984.

The Byrums dutifully, as instructed, returned with the executed release drawn by Mr. Whitlock. (APP. pages 161 to 165 .) They were also

[2] App. at 148.

present on January 18, 1984 with the cashier's check for yet another re-tender. Not one of the Respondents appeared on January 18, 1984. Fearful, cautious, given the mercurial nature of their adversary, and deeming it critical to protect their land from a sudden transfer of title by the trustee, having been admonished that the Whitlock release was required to be executed by January 18, 1984, the Byrums recorded the releases signed by them on the official land records of Louisa County, Virginia on January 18, 1984, to prevent transfer of their title by anyone given the bizarre and tenacious circumstances.

The Byrums would tender and re-tender the $3,000.00 check to W. W. Whitlock over and over only to have it thrown back at them even after

it was altered as Mr. Whitlock required per his December 20, 1983 letter. (See, APP. 154 to 157.) (See APP. 148.)

The matter came on before the United States District Court for the Eastern District of Virginia, at Richmond, on an action filed under diversity after the Virginia Supreme Court reversed a trial judge's judgment that a settlement had occurred, the reversal being on procedural jurisdictional grounds, viz., the Byrums had to file an independent action and not proceed in the original chancery cause. (Using 28 U.S.C. §1332.)

Twice the district court held for the Byrums ruling a settlement contract had been formed. Twice the district court ordered specific performance denying the Byrums any damages and commanded as did the state

trial court that the Byrums re-tender the $3,000.00 and their land freed.

The United States District Court first ruled in favor of the Byrums' motion for summary judgment that they had a settlement agreement as a matter of law as of December 16, 1983.

This was reversed and remanded with instructions to consider whether a settlement contract formed after December 16, 1983. Again, the district court ruled the Byrums and the respondents "Bear" et. al. had formed a contract of settlement even after December 16, 1983 by compliance with the Whitlock letter of December 20, 1983. (NOTE: The first decision was reversed by the Fourth Circuit panel in a published opinion. APP pages 50 to 66. The case was remanded with the notation that no settlement

had occurred on December 16, 1983 as a matter of law due to the "under protest" language. The remand was to consider "subsequent" developments after December 16, 1983.)

The District Court again granted the Byrums' motion for summary judgment. (Bear had also filed a motion for summary judgment.) The District Court took note of the Byrums' compliance with Mr. Whitlock's December 20, 1983 letter. (APP pages 154 to 157). They had retendered the check, altered as he demanded on January 9, 1984, corroborated by sworn state testimony (APP. page 160) and by January 18, 1984, they had come as directed to the courthouse and executed Mr. Whitlock's release carrying the check for retender again. (For check and release, See APP. pages 132 to 149).

The Byrums complained that the law of the forum was ignored and that FRCP Rule 8 was violated as was FRCP Rule 56 by the United States Fourth Circuit panel reversing the District Court's twice entry of summary judgment for the Byrums. They complained the panel misapprehended the law by declaring that no settlement contract was ever formed and no tender of the $3,000.00 cashier's check had recurred and then entering summary judgment for the Respondents.

The Byrums sought to have this erroneous interpretation of the law of the forum reheard by Petition to Rehear and with a suggestion to hear it en banc. Brought to the attention of the panel was its misapprehension of state forum law on settlements and that payment had

had to have been pleaded as an affirmative defense by FRCP #8(c) for it to be used by the Fourth Circuit panel to rule as it did that no re-tender occured thereby defeating the contract.

The Petition to Rehear was denied September 2, 1992.

REASONS FOR ALLOWING THE WRIT

I

THE LAW AND THE ARGUMENT

District Judge James R. Spencer twice did hold that a legal and binding agreement-to-settle established by Virginia law existed and did occur between the parties by his Orders of August 23, 1989, and December 3, 1991. In his well reasoned second opinion, APP. pages 23 to 49, he followed state law, the law of the forum, Virginia

law. (A state designated judge had similarly concluded the parties agreed to settle in two bench trials. These decisions were vacated on purely procedural jurisdictional grounds by decision of the State Supreme Court noting at oral argument that the Byrums had the right to file and independent action.)

The Byrums filed this case under diversity jurisdiction, the Byrums being citizens of Maryland, the Respondents citizens and a business in Virginia, the land being situated in Virginia, and the action being filed in the United States District Court for the Eastern District of Virginia, at Richmond.

Judge Spencer granted summary judgment in favor of the Byrums after a careful examination of the state

record established in the two state bench trial, by review of affidavits, exhibits, and the previous state trial transcripts of witnesses testifying under oath.

The appeals panel has so misapprehended this corroborating evidence that it suggests a frustration experienced by the parties as well, but overlooking the right to a trial under the Seventh Amendment with Virginia's Constitution having a similar provision under Article I, Section 11. The bulk of facts are not controverted, viz., that the parties agreed to settle, cash was exchanged, releases were exchanged, demands were met. To have agreed to settle is sufficient consideration to bind a settlement contract under Virginia law, and, the same can not be set aside

or declared a non-contract except for fraud, accident, or mistake, none of those occurring and being uncontroverted.

The controverted fact, and the sole one, is re-tender of $3000.00 to Mr. Whitlock and the appeals panel misapprehended those facts and if a reason to suspect the performance of the contract as to its terms or breach of it, a trial is proper. The issue recited by the panel is moot because it was never made an affirmative defense under FRCP #8(c). Even if this was not true, FRCP # 56 precludes summary judgment in that the Byrums repeatedly tendered the money only to have it thrown in their faces. They asserted the reason this occured was that their former counsel and his partners wanted a windfall, viz., valuable developable land for a song of cash in relation to its true value.

Judge Spencer's well reasoned decisions did not violate the uniformity of the decisions of the United States Supreme Court interpreting FRCP 8 and 56. Nor did he violated the Erie Doctrine by applying correcting existing state law, viz., as to the state law authority on settlements, standards for granting summary judgment (see below) and in diversity cases, applying the law of the forum, Virginia.

The District Court shall apply state law as well as the Appellate Court in reviewing for errors. Erie Railroad Company v. Tompkins 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). In Commissioner v. Estate of Bosch, 387 US 456, 18 L Ed. 2d 886, 87 S. Ct. 1776 (1967), this Court held that "...[T]he underlying substantive rule involved is based on state law

and the state's highest court is the best authority on its own law... In this respect, it may be said to be, in effect, sitting as a state court." Id. at 387 U.S. at 465.

The Appellate Court may not reverse the District Court except for a decision clearly erroneous as a matter of state law. It too is bound by state law as to the state's highest Court's decision on settlement contracts.

The District Court was correct as to the law of the forum in ruling for the Byrums as noted below.

The Appeals panel decision has misapprehended these and other points of state law and misapplied the FRCP in arriving at its decision of August 10, 1992 which is clearly erroneous. The U. S. Fourth Circuit panel can not modify controlling state law of the forum as it in its decision

of August 10, 1992 did.

The first panel previously reversed the District Court in a published opinion of June 20, 1991 misapprehending Virginia law as to its law of settlements and altering the law of the state forum to rule:

> "While the law encourages settlement, it also recognizes that a party making a settlement offer retains reasonable control over the terms on which it can be accepted." (Published panel opinion June 20, 1991.)

The Fourth Circuit rule is that a motion for summary judgment "should be granted only where it is perfectly clear no issue of fact is controverted." West v. Costen 550 F. Supp. 564 (W. D. Va. 1983) citing

Stevens v. Howard D. Johnson Co. 181 F. 2d 390, 394 (4th Cir. 1950.) The Supreme Court of the United States holds that a motion for summary judgment should not be granted only if there is a dispute of material fact. Adickes v. Kress & Co. 398 U.S. 144, 157, 90 S. Ct. 1598, 1608 (1970).

The appeals panel reversed summary judgment for the Byrums and on the second appeal, entered summary judgment for the Respondents. Following the reasoning of the June 20, 1991 panel about "reasonable control" if this is the law of the forum, which it isn't, this immediately called for the District Court to consider something entirely different than the mere agreement to settle is sufficient consideration to bind the contract in settlement and the same can not

be set aside nor declared a non-contract except for fraud, accident or mistake.

Misapprehending again the facts and the law, the panel never conceded nor apparently understood that here a contract in settlement and compromise formed when the parties by written letters agreed to settle, this being adequate and "valuable consideration" to sustain the contract by the law of the forum, and, then left to performance of the terms clearly being performed by the Byrums, the remaining disputed issue was specific performance and damages for its breach.

Proper then is to command of Bear thereafter specific performance based on the uncontroverted facts that the Byrums performed the demanded terms made by a tri-party adversaries two of whom never disputed there was a

settlement, received their cash, put it in their pockets and went down the road whistling Dixie. The lone hold-out, the Respondents, particularly the master of their misfortune, W. W. Whitlock, got everything they wanted from the Byrums and now with the Fourth Circuit panel decision, they have the land too. The District Court is legally correct in its ruling. (The Byrums still hold their deed and now come to the Court of last resort to rescue their land.)

Nonetheless, the second panel concluded:

> Although they did sign and tender the general release prepared by Whitlock, they failed to re-tender the $3,000.00 check ... no settlement contract could be formed under these

circumstances.

Again, the panel misapprehends state forum law entirely. The contract already existed, the re-tender is a factual dispute and many reasons and variable control it including Mr. Whitlock's repeated defiance of returning the tendered check for mercurial reasons with the hope he would eventually by fiat accomplii get the land regardless.

A settlement contract was formed when they agreed to settle. This is Virginia law, the law of the forum. Again misapprehending the facts, the Byrums **DID UNEQUIVOCALLY AND WITHOUT A PREADVENTURE OF DOUBT** re-tender the $3,000.00 check. A single tender is performance as a matter of law, but the re-tender in accordance with Mr. Whitlock's December 20, 1983 letter, striking the "under protest" language

was one he said he would "accept", and the panel misapprehended this clear and uncontroverted fact that the Byrums did just that and re-tendered the check January 9, 1984. Mr. Whitlock did not accept the check not then or ever when repeatedly re-tendered.

(NOTE: In the state proceeding prevailing over Mr. Whitlock in two bench trials, the Byrums paid the check into Court and Mr. Whitlock, refusing to accept tender again, instructed the Clerk of that Court to invest it pending his state appeal that saw the state trial court decision vacated on purely jurisdictional grounds, viz., that the trial judge had no jurisdiction on a final state order after a certain time pursuant to a state rule.)

The panel decision is in clear conflict with other decisions

of this Court and the United States Supreme Court and under diversity jurisdiction, the decision violates the Erie Doctrine that applicable state law of the forum controls as to "settlement agreements" recognized in Virginia as favored in the law. The panel acknowledge this as state law, then altered it.

The very agreement-to-settle to end further disputes and litigation being "valuable consideration", in fact "highly favored" in Virginia, is the forum law long upheld in Virginia Jurisprudence. Zane's Devisees v. Zane 6 Munford (20 Va.) 406 (1819); Mosby v. Leeds 3 Call (7 Va.) 437 (1803); cited in, as controlling state law authority, Eggleston v. Crump, 150 Va. 414, 418-419 143 S.E. 688 (1928). No Virginia appellate authority is to the contrary.

In the latter regard, both the District Court and the Appellate panel of the U. S. Fourth Circuit cited Bangor-Punta Operations, Inc. v. Atlantic Leasing, Ltd. 215 Va. 180, at 183, 207 S.E. 2d 858, at 860 (1974) as authority for the law of the forum. This case springs from the above source and controlling authority of Eggleston v. Crump (cited above) which appellate case authority was based on Zane v. Zane (cited above) and C & O Ry. Co. v. Mosby 93 Va. 100, 24 S.E. 918. (1896). (See also, Virginia Shipbuilding Corp. v. United States Shipping Board, 292 F. 440 (E.D. Va. 1923); cert. denied 276 U.S. 625 (1928); Dagounakis v. The Santa Madre 183 F. Supp. 54 (E.D. Va. 1959, aff'd 277 F. 2d 461 (4th Cir. 1960.)

All of these cases citing the law of the state forum stand for the position that the agreement-to-settle and compromise is "valuable" and "highly favored" consideration of itself sufficient to sustain and enforce a contract in Virginia. No disputed question of fact exists that the parties did not agree to settle. Only the terms of performance were fought over. For that reason alone, summary judgment is improper to be entered for the Respondents.

Mr. Whitlock and all participants offered to settle and the Byrums accepted to settle. A settlement contract formed.

To have lack of tender [or payment] as an affirmative defense, it must be pleaded. Bear Investment made no such affirmative plea in their responsive pleadings. (APP. pages

104 to 116, Affirmative Defenses page 116-117) This is required under FRCP Rule 8 (c). The panel apparently overlooked this controlling rule of Federal Rules of Civil Procedure and chose the alleged failure (controverted fact) of the Byrums to re-tender $3000.00 which they had done any number of times to no avail. The Respondents wanted the land, not the money. No affirmative defense of payment (re-tender) was ever made.

Accordingly, the panel should have reversed itself on the Petition to Rehear or now be reversed and final judgment entered for the Byrums with the parties performing under Judge Spencer's final order.

Tender being a matter of fact for a jury, it can be a matter for the Court where there is no dispute,

and no dispute exists as the evidence above clearly demonstrates. As a matter of state law, the Court can so rule or so advise the jury. Tender and re-tender did occur in accordance to Mr. Whitlock's instructions, an undisputed fact. This is the law of the forum. Henderson v. Foster 139 Va. 543, 124 S.E. 463 (1924) which is entirely consistent with Federal Rules of Civil Procedure, Rule 8(c).

CONCLUSION

Consideration by the Court is necessary to secure or maintain uniformity of its decisions and, the proceeding involves a question of exceptional importance, viz., that this manifest injustice will be worked upon the Byrums' lifetime investment, their Virginia farm, held by them since

1950's which they had resecured from a forced foreclosure by their former lawyer in a dispute over his fees and resecured the farm by a valid settlement agreement from a former lawyer and his partnership by a settlement agreement, which agreement was held to have been in existence by no less than two trial judges in two separate bench adjudications considering all the facts and evidence, state and federal.

The District Trial Court reversed by the sitting panel twice, so misapprehending the facts and the law in reversing the District Court a second time, refusing the Petition to Rehear to alter their erroneous decision, this Court's power is necessary to correct a manifest injustice.

The decision to enter summary

judgment for Bear Investment clearly is contrary to the law of this Court under the facts described and will result in the unjust delivery of the Byrums' land to Bear Investment Company who by the law of the forum agreed to settle. Thus, the Erie Doctrine is entirely ignored by the appeals panel.

The Byrums request a writ to review the panel's misapprehension of the law and facts that rendered a clearly erroneous decision contrary to the law of the state forum and being in violation of the Erie Doctrine announced by the United States Supreme Court as the law of this nation, and, to conform the decision to the prior decisions of this Court being necessary to secure and maintain uniformity of its decisions, viz., and to enforce

the Federal Rules of Civil Procedure as well as to uphold their right to trial under the state and federal constitutions.

The Byrums pray for a writ and a favorable decision either by per curiam decision based on the briefs or by granting a writ of certiorari.

Respectfully Submitted:

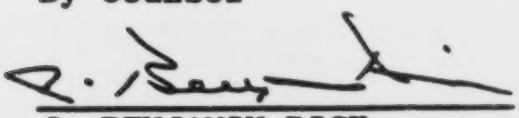
BARNEY L. BYRUM,

ELIZABETH Y. BYRUM

BARNEY L. BYRUM, III and

SPENCER N. BYRUM

By Counsel



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APPENDIX INDEX

DOCUMENT	PETITION TEXT PAGE	APPENDIX PAGE
Unpublished Opinion, U. S. Fourth Circuit Panel dated August 10, 1992.....	1	4 - 19
Memorandum & Final Order of District Court.....	1-2, 27	20 - 49
Order Denying Petition To Rehear.....	3	1 - 3
Plaintiff's Complaint...	10	67 - 103
Defendant's Answer.....	10	104 - 116
Pleaded Affirmative Defenses.....	10	116 - 117
Deed of Trust	13	118 - 123

APPENDIX INDEX
(Continued)

DOCUMENT	PETITION TEXT PAGE	APPENDIX PAGE
Bond	18	130 - 131
Bondholder, Trustee and Buyer Announced Terms to Settle	18	132 - 143
Cashed Cashier's Check and Letters with Checks to Settle	18	132 - 143
First Byrum Release and as Altered Striking Under Protest.	18	127 - 129 & 148
Whitlock Check with Byrums' and Counsel's Striking of "Under		

APPENDIX INDEX
(Continued)

DOCUMENT	PETITION TEXT PAGE	APPENDIX PAGE
Protest" on the check Per Whitlock December 20, 1983 letter.	19	154 - 157 & 148
W. W. Whitlock December 20, 1983 Letter.	19,23,25	154 - 157
State Settlement Order Endorsed by all Counsel of Parties Except W. W. Whitlock.		150 - 153
A. G. Johnson, Bear Investment General Partner Sworn Testimony		

APPENDIX INDEX
(Continued)

DOCUMENT	PETITION TEXT PAGE	APPENDIX PAGE
on Tender of $3,000 check	20	160
Trustee's Lawyer January 12, 1984 Letter Commanding Execution of Whitlock's Release by January 18, 1984.		127 - 129 158 - 159
Executed Whitlock Drawn Release by Byrums before Notary Public on January 18, 1984 Submitted State Court January 18, 1984...		161 - 165
Published Fourth Circuit Panel Opinion dated		

APPENDIX INDEX
(Continued)

DOCUMENT	PETITION TEXT PAGE	APPENDIX PAGE
June 20, 1991.....	24	50 - 66
Judge James Spencer		
Memorandum Opinion.....	27	23 - 49

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

Sept. 2, 1992

NO. 91-2747

CA-88-853-3

BARNEY L. BYRUM; ELIZABETH Y. BYRUM, et. ux.; BARNEY L. BYRUM,III; SPENCER N. BYRUM,

Plaintiffs-Appellees,

v.

BEAR INVESTMENT COMPANY; EDWARD J. WHITLOCK, Partner; ROBERT A. WHITLOCK, Partner; ALBERT G. JOHNSON, Partner; W. W. WHITLOCK, Agent, Principal Officer W. W. Whitlock Agency, Inc., General Partner and personally,

Defendants-Appellants.

No. 92-1005

CA-88-853-3

BARNEY L. BYRUM; ELIZABETH Y. BYRUM, et. ux.; BARNEY L. BYRUM,III; SPENCER N. BYRUM,

Plaintiffs-Appellants,

v.

BEAR INVESTMENT COMPANY; EDWARD J. WHITLOCK, Partner; ROBERT A. WHITLOCK, Partner; ALBERT G. JOHNSON, Partner; W. W. WHITLOCK, Agent, Principal Officer W. W. Whitlock Agency, Inc., General Partner and personally,

Defendants-Appellees.

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The appellees' filed a petition for rehearing with suggestion for

rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Wilkinson, with the concurrence of Judge Widener and Judge Sprouse.

For the Court,

/s/ Bert M. Montague

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

BARNEY L. BYRUM; ELIZABETH Y. BYRUM, et ux.; BARNEY L. BYRUM, III; SPENCER N. BYRUM,

Plaintiffs-Appellees,

v. NO. 91-2747

BEAR INVESTMENT COMPANY; EDWARD J. WHITLOCK, Partner; ROBERT A. WHITLOCK, Partner; ALBERT G. JOHNSON, Partner; W. W. WHITLOCK, Agent, Principal Officer W. W. Whitlock Agency, Inc., General Partner and personally,

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BARNEY L. BYRUM; ELIZABETH Y. BYRUM, et ux.; BARNEY L. BYRUM, III; SPENCER N. BYRUM,

Plaintiffs-Appellants,

v. NO. 92-1005

BEAR INVESTMENT COMPANY; EDWARD J. WHITLOCK, Partner; ROBERT A. WHITLOCK, Partner; ALBERT G. JOHNSON, Partner; W. W. WHITLOCK, Agent, Principal Officer W. W. Whitlock Agency, Inc., General Partner and personally,

Defendants-Appellees.

Appeals from the United States District Court
For the Eastern District, at Richmond.
James R. Spencer, District Judge.
(CA-88-853-3)

Argued: June 5, 1992

Decided: August 10, 1992

Before WIDENER, SPROUSE, and WILKINSON, Circuit Judges.

Affirmed in part, reversed in part, and remanded with instructions by unpublished per curiam opinion.

COUNSEL

ARGUED: Charles Roland Haugh, HAUGH & HAUGH, Charlottesville, for Appellants. J. Benjamin Dick, LAW OFFICES OF J. BENJAMIN DICK, Charlottesville, Virginia, for Appellees. ON BRIEF: Lair D. Haugh, HAUGH & HAUGH, Charlottesville, Virginia, for Appellants.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

This case is before us a second time. Previously, we concluded that no contract to settle the parties' dispute over a parcel of land existed as of December 16, 1983, and we remanded for a determination as to whether an enforceable settlement contract was subsequently formed. The district court concluded on remand that one had been formed, and is granted plaintiffs' motion for summary judgment on their claim for specific performance. We conclude that no settlement contract had been formed and therefore reverse the judgment in this respect. We affirm the district court's dismissal of plaintiffs' other claims.

I.

This case involves a dispute over a parcel of land in Louisa County,

Virginia. Plaintiffs Barney and Elizabeth Byrum (the Byrums) are the record owners of the property, which was auctioned to defendant Bear Investment Co. (Bear) in a foreclosure sale. The Byrums filed suit in state court challenging the foreclosure, and during the pendency of that litigation the Byrums' attorney, J. Benjamin Dick, solicited a settlement offer from Bear. On December 2, 1983, Bear's representative, W. W. Whitlock, responded by offering three options for returning the land to the Byrums. He emphasized, however, that any settlement would require the Byrums to sign a general release and that they must understand that any settlement was an "effort to help them. If they do not feel this is true, then we would not want to have any of the above options completed."

The Byrums responded by letter on December 16 with a check for $3,000.00 (as specified in option one) and a signed general release. The letter, however, indicated that the money was "paid under protest," on the front of the check was typed "Purpose: To save Byrums Farm & payoff under protest." In addition, the release stated that the Byrums were "under extreme pressure" to settle the case so as to save their land.

In our previous opinion, we concluded that the Byrums' response of December 16 was not an acceptance of Bear's settlement offer and, therefore, no settlement contract between the Byrums and Bear had been formed as of that date. See Byrum v. Bear Inv. Co., 936 F. 2d 173, 175-76 (4th Cir. 1991) (Byrum I). The question

here is whether such a contract was subsequently formed.

On December 20, Whitlock responded to the December 16 response. He indicated to Dick that both the check and the general release were inadequate but that Bear remained prepared to settle the dispute. Whitlock wrote that all the Byrums had to do was sign the general release that he had prepared and enclosed, and re-tender their $3,000.00 check with the words "under protest" stricken. When counsel for the parties met on January 9, 1984, the Byrums did tender the original check with the words "under protest" stricken, but they failed to submit the release prepared by Whitlock. Instead, they submitted a slightly amended version of the original release: the unamended version stated that "we

do agree under protest to pay ...", on the amended version, that words "do agree under protest" were lined out and the sentence was altered to read, "we are forced to pay ..." Bear rejected the Byrums' re-tender on January 9 and again offered to settle on the terms stated by Whitlock in his December 20 letter.

On January 18, the Byrums executed the release prepared by Whitlock and recorded the document at the Office of the Louisa County Clerk. At the same time, however, they also recorded the release tendered to, and rejected by, Whitlock on January 9, as well as a "notice." The notice indicated that the Byrums had agreed to "submit to [Bear's] demands to save their land and do so under that force and pressure." Moreover, contrary to Whitlock's

instructions, the Byrums never tendered the $3,000.00 check. Instead, on February 10, Dick wrote to Whitlock to explain why not: "As I have tendered the $3,000.00 check twice and you have given back to me twice, I feel you do not want the money and I think your action to not take the money would be gracious."

Based on the Byrum's actions on January 18, the district court (on remand after Byrum I) concluded "the Byrums ha[d] substantially complied with the terms of Bear[']s counteroffer of January 9" and held accordingly, that a settlement contract had been formed. If therefore granted summary judgment to the Byrums on count one of their complaint, which sought specific performance of the alleged settlement contract. Based on the general release

signed on January 18, it granted summary judgment to Bear on the Byrums' other claims. [1]

We explained the governing Virginia law in Byrum I. The formation of settlement agreements is subject to general principles of contract law. Byrum I, 936 F.2d at 175. Under these principles, acceptance of an offer to settle "must be unequivocal and unqualified in order to bind the offerer." Id. Moreover, "[a] material variance between the acceptance and the offer results in a rejection of the original offer and transforms the

---

[1] In addition to the claim for specific performance, the Byrums sought damages for, inter alia, "intentional breach of contract," "injury to real property," and "third party interference with contract effecting injury to real property."

putative acceptance into a counter-offer." Id.

We conclude that, under these principles, no settlement contract was formed between the Byrums and Bear at any time after December 16. On December 20, Whitlock told the Byrums precisely what they had to do to accept Bear's settlement offer: sign the enclosed general release prepared by Whitlock, and tender a $3,000 check with the words "under protest" struck out. The Byrums' response on January 9 materially differed from this offer because the original release, only slightly amended, was tendered instead of the release prepared by Whitlock. This response, therefore, constituted a rejection of Bear's December 20 offer and a counteroffer. That counteroffer was immediately rejected by Bear, and

on January 9 the terms of the December 20 offer were reiterated. This presented the Byrums with yet another opportunity to comply.

This they failed to do. Although they did sign and tender the general release prepared by Whitlock, they failed to re-tender the $3,000 check.[2] The failure to tender the $3,000 check obviously was a material variance from the terms of the January 9 offer and constituted a rejection thereof. In the absence of a payment

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[2] The Byrums claim that they did, in fact, tender the $3,000 check on February 15 but that it was rejected by Bear. The district court, however, concluded that "[t]he Byrums never tendered payment to Bear after January 9, 1984," and we see no reason to overturn its finding.

of $3,000, the district court was wrong to conclude that the Byrums "substantially complied" with Bear's January 9 offer. Although Dick suggested in his February 20 letter that Bear settle based solely on the signed general release, this counteroffer was unequivocally rejected by Bear.

Moreover, the language in both the "notice" and the alternative version of the general release, both recorded on January 18 along with the signed release prepared by Whitlock, raises the same problem addressed in Byrum I. Bear was negotiating not only for "an exchange of land for money," but also "for an end to an acrimonious dispute over the land." Byrum I, 936 F.2d at 176. The language in the notice and alternative release "suggested that Bear might be deprived of the

benefit of its bargain because the Byrums remained reluctant to end the dispute and appeared to be angling both for the land in an immediate sense and for the return of their money at some future time." Id. For the reasons explained in Byrum I, no settlement contract could be formed under these circumstances.

Because no settlement contract was formed after December 16, 1983, Bear, not the Byrums, was entitled to summary judgment.

III.

The Byrums cross-appeal the district court's grant of summary judgment to Bear on all of its other claims. They argue that they are entitled to damages based on the causes of action stated in counts two through five of their complaint.

We conclude that summary judgment was properly entered for Bear on these claims. The Byrum's amended complaint, with five counts, was filed in April 1989. In June 1989, the district court granted Bear's motion to dismiss counts two through five, but denied the motion as to count one (which sought specific performance of the alleged settlement contract). As the Byrums never appealed the dismissal of these claims, that dismissal is the law of the case and may not be challenged now. See Williamsburg Wax Museum, Inc. v. Historic Figures, Inc., 810 F.2d 243, 250 (D.C. Cir. 1987); Arnold v. Eastern Air Lines, Inc., 681 F. 2d 186, 206 n.22 (4th Cir. 1982); 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §4478, at 801 (1981).

IV.

In sum, we reverse the summary judgment entered for the Byrums on their claim for specific performance of the alleged settlement contract, and we affirm the summary judgment entered for Bear on the Byrums' other claims. We remand the case to the district court with instructions to enter judgment for defendants on all claims and to dismiss this case.

AFFIRMED IN PART, RESERVED IN PART, AND REMANDED WITH INSTRUCTIONS.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Barney L. Byrum, et. al.,	
Plaintiffs,	
v.	CA No.88-0853-R
Bear Investment Co., et. al.,	
Defendants.	

ORDER

The matters before the court are the Plaintiffs' and the Defendants' Motion for Summary Judgment.

The court has determined that a genuine issue of material fact does not exist.

Summary judgment is GRANTED in favor of the Plaintiffs to the extent that the court determines that there

was a valid contract existing between the Plaintiffs and the Defendants no later than February 10, 1984. The remainder of the Plaintiffs' Motion for Summary Judgment is denied.

Summary judgment in favor of the Defendants is GRANTED to the extent that all causes of action for breach of contract and related complaints pursuant to the February 10, 1984 contract are hereby extinguished. The Defendants' Motion for Summary Judgment is DENIED to the extent that the court finds that the parties entered into a valid contract no later than February 10, 1984.

The Plaintiffs are therefore ORDERED to tender the agreed upon amount of $3,000 to Bear Investment Co. in exchange for which Bear is ORDERED to transfer full unclouded title to

the disputed land to the Byrums.

The court ORDERS that the release executed by the Plaintiffs on January 18, 1984, remain in effect indefinitely. The Plaintiffs are ORDERED to refrain from bringing any further action against the Defendants save for action to correct any deviation from this order.

And it is SO ORDERED.

Signed: JAMES R. SPENCER
United States District Judge

DATE: Dec. 3, 1991

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Barney L. Byrum, et. al., Plaintiffs, v. Bear Investment Co., et.al., Defendants.	CA#88-0853-R

MEMORANDUM OPINION

This case is an action on remand from the Fourth Circuit Court of Appeals whose decision was rendered on June 20, 1991. The matters before the court are cross motions for summary judgment. This complaint, filed in 1988, was filed in diversity because the Plaintiffs are residents of Maryland and the Defendants are residents of

Virginia. It is the latest chapter in a string of proceedings which began in 1979 over the foreclosure by a party not a party to this action on some land owned by the Plaintiffs. The key question to be decided by this court on the cross motions is whether actions taken by the Plaintiffs subsequent to December 16, 1983, constituted an acceptance of a settlement offer by the Defendants. The question of the existence of an agreement at any time after December 16, 1983, was not reviewed by this court in earlier proceedings and thus remains to be settled. Byrum v. Bear, No. 89-1546, 6-7 (4th Cir. 1991).

The Byrums are owners of record of a parcel of land in Louisa County, Virginia. Bear Investment Co. acquired the land at auction after

the foreclosure in 1979. The foreclosure was challenged by the Byrums in Louisa County Circuit Court before the foreclosure sale was completed. While this litigation was still pending, the Byrums' attorney sought a settlement offer from Bear. Bear's representative, W. W. Whitlock, responded by letter on December 2, 1983. Mr. Whitlock offered three options for returning the land to the Byrums, provided that the Byrums executed a complete general release.

On December 16, 1983, the Byrums responded by letter enclosed with which was a check for $3,000, pursuant to the settlement proposed by Bear. They later stated that the check was being paid "under protest". The words "Purpose: To save Byrums Farm & payoff under protest" were typed

on the front of the check. The release stated that the Byrums were "under extreme pressure" to settle the case to save their land.

A controversy has since ensued over whether the said words precluded the conclusion that the Byrums' letter and check constituted an acceptance of Bear's settlement offer. Suit was filed in this court by the Byrums in 1988. The Fourth Circuit ruled on appeal that the words on the check represented a counteroffer and rejection, then remanded to this court for further proceedings.

II

Cross motions for summary judgment must be ruled on individually and, while their coexistence indicates that both parties are asserting that there is no genuine issue of material

fact, the parties may not believe that they are agreeing on the same set of facts. Therefore cross motions for summary judgment do not constitute a waiver of the right to a full trial or to trial by jury. Charles A. Wright, Federal Practice and Procedure, §2720 (1983).

III

The Fourth Circuit ruled that Virginia law applied and that under the law settlement agreements are treated as contracts subject to the general principles of contract law. Byrum, No. 89-1546 at 4 [citing Bangor-Punta Operations, Inc. v. Atlantic Leasing, Ltd., 215 Va. 180, ___, 207 S.E.2d 858, 860 (1974)]. Acceptance must be unequivocal and unqualified in order to bind the offeror. Nolan Bros., Inc. v. Century Sprinkler

Corp., 220 F.2d 726, 728 (4th Cir. 1955). The Fourth Circuit noted that Bear was negotiating for more than an exchange of land for money, that it was bargaining for an end to an acrimonious dispute over the land. Bear could not be assured of such relief given the reservations expressed by the Byrums. Therefore no enforceable agreement was established. Byrum, No. 89-1546 at 6. The Fourth Circuit did not rule on whether later negotiations between the parties constituted an enforceable agreement because this court had not ruled on such matters. Id. at 607.

The question of whether the determination of the existence of a contract is a question of law or of fact may be a close call. Summary judgment may be inappropriate in the

case where there is a factual dispute regarding the existence of a valid and binding agreement. Wright, Federal Practice §2730.1. There may be situations in which the intentions of both parties are so unequivocal as to present no genuine issue of fact although in protracted negotiations the intentions of the parties are rarely so unequivocal. Charbonnages de France v. Smith, 597 F.2d 406, 415 (4th Cir. 1979). But there is case law in Virginia still uncontroverted that holds that to determine the existence or non-existence of a contract based upon the correspondence between the parties is "the exclusive province of the court". Bloomberg-Michael Furniture Co. v. Coppes Bros. & Zook, 141 Va. 18, 20, 126 S.E. 59, (1925). In the case at bar there does not appear to be any factual dispute. Throughout

the arguments and counterarguments of both parties, clouded by rhetoric as the arguments are, there is a common thread of facts. Where the record taken as a whole could not lead the rational trier of fact to find for the non-moving party, summary judgment is appropriate. Miller v. Federal Deposit Ins. Corp., 906 F.2d 972, 974 (4th Cir. 1990). The Defendants admit to the facts necessary to determine that a contract existed. Defendants' Brief on Motion for Summary Judgment, 2nd-5th unnumbered pages (July 24, 1991). Defendants include in their brief the key correspondence as exhibits. Defendants' Brief, Attachment L. In the case at bar the evaluation of the facts at this late stage does not depend upon the credibility of their source. See Miller v. Leathers 913 F.2d 1085,

1089 (4th Cir. 1990), cert. denied, 111 S.Ct. 1018 (1991).

Once the court determines that a contract existed, the court can rule on summary judgment as it relates to other issues as they depend on the terms of the contract. Ordinarily the interpretation of a written contract is solely a function to the court. Only where extrinsic evidence is required to construe the contract does a question for the jury arise. American Ins. Co. v. Damascus Lumber Co. 139 Va. 380, 385, 124 S.E. 269, ___ (1924). The key issue is one of whether, given the facts as they occurred and seem to have been accepted by both parties, a binding agreement existed at any time in the course of the negotiations between the parties in late 1983 to early 1984. This issue is one of law

which is appropriate for resolution by summary judgment.

V

The legal questions arise out of the interactions between the parties in December, 1983 and January, 1984. On December 2, 1983, Mr. Whitlock wrote Mr. Benjamin Dick, counsel for the Plaintiffs, offering three options for settlement. Option one involved an exchange of $3,000 and no further court appearance for clear title to the property for the Byrums in exchange for $4,000 plus whatever Bear had to pay to settle for the property. Option three allowed that if certain condition in option two were not met and Bear had to take title to the property and obtain title insurance, then the property would be redeemed to the Byrums for $5,000 above whatever amount Bear had

to pay to obtain title to the property. All three options required a general release signed by the Byrums.

Mr. Dick responded by letter on December 16, 1983. He enclosed the $3,000 check with this letter, pursuant to option one. It was at this time that the Fourth Circuit has determined that an agreement had not yet taken place. The law is clear that an "acceptance" which varies materially from the offer is not an offer at all, but operates as a counteroffer. "... the common law rule that a counteroffer terminates the power of acceptance is still a sound rule ..." Arthur L. Corbin, Corbin on Contracts, §90 (1963). For purposes of clarity it should be noted that "counteroffer" and "conditional acceptance" are the same thing. Both

terminate the power of acceptance. Corbin, Contracts §89. A counteroffer serves to terminate the offer and any power of acceptance on the part of the offeree rendering inoperative any future attempt at acceptance on the same offer. Samuel Williston, A Treatise on the Law of Contracts §57 (3rd. edit. 1957).

Virginia law is likewise clear on the issue of variance between the offer and the acceptance. To form a contract there may not be any material variance between the acceptance and the offer. Chittum v. Potter, 216 Va. 463, 467, 219 S.E.2d 859, ____ (1975). See also Wells v. Weston, 229 Va. 72, 78, 326 S.E.2d 672, ____ (1985). A contract may be established by correspondence between the parties, but acceptance on varying terms is

a rejection. Lynchburg Hosiery Mills v. Chesterfield Mfg. Co., 107 Va. 73, 76-77, 57 S.E. 606, 607, (1907). A proposal to accept based upon terms varying from the offer is a rejection, and ends the negotiations unless the original offeror assents or renews his offer. Richeson v. Wilson, 187 Va. 536, 546, 47 S.E.2d 393, ___ (1948). See also Quality Home Builders, Inc. v. Herrick, 210 Va. 723, 729-30, 173, S.E.2d 846, ___ (1970) (quoting Rotella, infra); Rotella v. Lange, 202 Va. 575, 578, 118 S.E.2d 516,____ (1961) (quoting Richeson). Thus Virginia case law clearly labels a proposal for acceptance at variance with the offer as a rejection which precludes any future acceptance of the original offer.

On December 20, 1983, Mr. Whitlock acknowledged by letter Mr.

Dick's check for $3,000 and rejected Mr. Dick's proposals. While Mr. Whitlock admitted that he did not know the exact purpose of the use of the words "under protest", he refused to accept the settlement with such a cloud hanging over it. Mr. Whitlock enclosed the general release that the Byrums were required to sign before the proposed settlement could be consummated and returned the Byrums' check and release, asking that the words "under protest" at least be stricken from the check, or better yet, that the check be reissued. Bear was now making a counteroffer on December 20.

Counsel for the Byrums and Bear met on January 9, 1984. According to the Byrums, they again tendered

the original release, slightly amended,[1] and the original check with the words "under protest" stricken from the check. Bear rejected the re-tender offer of January 9, 1984, and insisted that the Byrums comply with the terms set forth in Mr. Whitlock's letter of December 20, 1983 (Defendants' Brief of 4th unnumbered page). Therefore seemingly Bear had terminated the Byrums' offer and made a counteroffer.

---

1 The slight amendment amounted to the words "do agree under protest" being lined out from the clause" ... we do agree under protest to pay the purchaser of our land at the forced auction of November 19, 1979, so ordered by John C. Lowe ..." and the words "are forced" being substituted and initialed by E.B. (Elizabeth Byrum) and B.B. (Barney Byrum)

However, by its own admission in its brief supporting its motion for summary judgment, Bear admits that the following were the additions made on December 20 to its December 2 offer.

1. The Byrums must not have reservations about the settlement;

2. The Byrums must tender no settlement terms under protest;

3. The Byrums must execute the general release prepared by Whitlock (enclosed in the December 20, 1983, letter);

4. That the Byrums' $3,000 check had to be rewritten or replaced with an new check not containing the words "under protest".

On January 18, 1984, the Byrums executed the release previously

prepared by Mr. Whitlock. They recorded the agreement at the Office of the Louisa County Clerk, because they were under the impression that Bear was forcing them to sign by that date or lose their land. They did not tender the release to Mr. Whitlock. The clerk's office was the only office open that day at the courthouse because of a snowstorm according to the Byrums, which contention is uncontested by Bear. The Byrums never tendered payment to Bear after January 9, 1984.

An analysis of the additional terms reveals that the Byrums have substantially complied with the terms of Bears counteroffer of January 9. The first requirement that the Byrums must have not reservations is moot to the issue of agreement as the mental reservations of the parties do not

affect the evaluation of the parties' intent. Wells, 229 Va. at 78-79, 326 S.E.2d at 676. See also Lucy v. Zehmer, 196 Va. 493, 502, 84 S.E.2s 516, 521 (1954); Richardson v. Richardson, 10 Va. App. 391, 396, 392 S.E.2d 688, ___ (1990). "The law imputes to a person an intention corresponding to the reasonable meaning of his words." First Nat'l Exch. Bank v. Roanoke Oil Co., 169 Va. 99, 114, 192 S.E. 764, 770 (1937) (quoting 13 C.J. 265). The Byrums complied with the requirement that they tender no settlement terms under protest as they had stricken the words "under protest" from the check and had revised their release to remove the words "under protest", thus fulfilling the second additional requirement. The Byrums did execute the release prepared by Bear. They

did so at the Louisa County Courthouse on January 18. There was nothing in Bear's offer to indicate that the Byrums had to execute by a certain date. Whether this the final act in compliance with the revised Bear offer, save for the tendering of $3,000 which the Byrums had made obvious they were willing to do, was sufficient to represent acceptance is immaterial in light of subsequent events.

It is true that acceptance may be inferred from the acts and conduct of the offeree. Durham v. National Pool Equip. Co., 205 Va. 441, ___, 138 S.E.2d 55, 58 (1964). See also Bankers Credit Serv. of Vermont v. Dorsch, 231 Va. 273, ___, 343 S.E.2d 339, 341 (1986); Bernstein v. Bord, 146 Va. 670, 675, 132 S.E. 698, ___ (1926). However, acceptance must be

communicated to the offeror, either actually or constructively. Green's Ex'rs v. Smith, 146 Va. 442, 452, 131 S.E. 846, reh'g denied, 146 Va. 459, 132 S.E. 839 (1926). See also Piland Corp. v. Rea Constr. Co., 672 F. Supp. 244, 246 (E.D. Va. 1987) (citing Michie Jurisprudence). But acceptance may be communicated by doing what was requested. Morris v. Bragg, 155 Va. 912, 920, 156 S.E. 381, ___ (1931). The court need not reach a conclusion on this question, because in a letter dated Feburary 10, 1984, a copy of which is in the record (Defendants' Brief, Attachment L, Exhibit 8), Mr. Dick on behalf of the Byrums informed Mr. Whitlock of Bear that the release had been executed before a notary public. At the latest, there was notification of the Byrums' acceptance on February

10, if the January 18 recording was not enough. Thus the third additional requirement was fulfilled. The letter of December 20, 1983, from Mr. Whitlock to Mr. Dick, taken in conjunction with the Defendants' Brief itself (4th unnumbered page) establishes that the $3,000 amount was still on the table. The $3,000 check had the words under protest deleted from it so the Byrums were in substantial compliance with the requirement that the check not be written "under protest". Since the check was now in substantial compliance with the terms of Bear's offer, the Byrums had now accepted Bear's December 20 offer. Since the Byrums were now the offeree, Bear did not have the option to reject the acceptance.

Bear resorts at this late date to a myriad of technical details

to tray to defeat a contract with whose terms the Byrums had substantially complied. That in retrospect the sequence of events leading up to the contract does not fall into a neat order which complies literally with the mandate of the offer-counteroffer-acceptance progression should not defeat an agreement when the Byrums had complied with all the terms of the latest Bear offer. "While identifiable offer and acceptance are the classic mechanisms for contract formation, 'manifestations of mutual consent' may be made even though neither offer nor acceptance can be identified and even though the moment of contract formation cannot be determined'." Charbonnages 597 F.2d at 417 [quoting Restatement (Second) of Contracts §22(2)]. "The terms of the agreement

were not obscure nor were the concepts unfamiliar to the litigants. Thus the outward expression of the parties in assenting to the agreement will control." Richardson, 10 Va. App. at 397, 392 S.E.2d at ___.

Thus the court holds that there did exist an agreement on the settlement no later than February 10, 1984. Bear had not withdrawn its latest offer. The Byrums had not done anything to reject and had complied with the terms of Bear's offer. Bear cannot in an action started four years later defeat the contract of claiming that the process of offer and counteroffer was not one of pure textbook quality. Even when the facts are interpreted in the light most favorable to Bear, it is apparent that an agreement did exist. See Ballinger v. North Carolina

Agric. Extension Serv., 815 F.2d 1001, 1004 (4th Cir.), cert. denied, 484 U.S. 897 (1987).

VI

If the court enters summary judgment for the Byrums on the issue of the existence of an agreement, then it will have determined that there was an agreement on January 18, or February 10, 1984. Interpretation of this agreement is now an issue within the province of the court. American Ins. Co., 139 Va. at 385, 124 S.E. at ___. In either case the release from all further action was part of the agreement.[2] Therefore the Byrums

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2 For a copy of the signed release, see Reply Response to Defendants' Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment, Attachment E (Aug. 6, 1991).

by virtue of that same agreement which they say existed and still exists are bound not to bring further action against Bear and the particulars of that partnership. Thus summary judgment in favor of an agreement means that summary judgment must be entered in favor of the defendants on the remainder of the counts.

It should be noted in passing that Bear is, by the very nature of this ruling and order, protected from further action no matter how the Byrums feel. The court fears that given the drawn out and highly emotional nature of this case, there will persist bitterness on both sides, although hopefully not for long. But the persistence of any such bitterness does not preclude the need to bring this case to a close. The Byrums will

have their land and Bear will be protected from further actions by the Byrums.

VII

The court has determined that there exists no genuine issue of material fact in this case. Therefore the court enters summary judgment as follows. There was a settlement contract reached as early as January 18 and no later than February 10, 1984. Pursuant to the terms of that contract Bear is ordered to return the land in question to the Byrums with clear title in accordance with the settlement contract. In return the Byrums are ordered to pay the agreed upon amount of $3,000 to Bear. All other action by the Byrums against Bear shall be adjudged in favor of Bear. In addition the Byrums are ordered not to bring

any further action in this matter except if Bear should fail to return full title in the Byrums' land to them in return for the agreement upon amount.

An appropriate order shall ISSUE.

Signed: JAMES R. SPENCER
United States District Judge

DATE: Dec. 3, 1991

[PUBLISHED]

Barney L. BYRUM; Elizabeth Y. Byrum, et ux.; Barney L. Byrum, III; and Spencer N. Byrum, Plaintiffs-Appellees,

v.

BEAR INVESTMENT COMPANY; Edward J. Whitlock, Partner; Robert A. Whitlock, Partner; Albert G. Johnson, Partner; W. W. Whitlock, Agent, Principal Officer W. W. Whitlock Agency, Inc., General Partner and Personally, Defendants-Appellants.

NO. 89-1546

United States Court of Appeals,

Fourth Circuit,

Argued: March 6, 1991.

Decided: June 20, 1991.

Record owners of property brought action contending that there

was valid acceptance of settlement offer of property foreclosure dispute. The United States District Court for the Eastern District of Virginia, James R. Spencer, Judge, found that settlement was enforceable. Appeal was taken. The Court of Appeals, Wilkinson, Circuit Judge, held that settlement was unenforceable.

Reversed and remanded.

1. **Compromise and Settlement - 11**

Under Virginia law, settlement agreements are treated as contracts subject to general principles of contract interpretation.

2. **Compromise and Settlement - 8(1)**

Under Virginia law, question of whether enforceable settlement has been reached is governed by intent of parties as objectively manifested.

3. **Compromise and Settlement - 5(2)**

Acceptance of settlement offer must be unequivocal and unqualified in order to bind offeror.

4. **Compromise and Settlement - 5(2)**

Material variance between acceptance of settlement and offer results in rejection of original offer and transforms putative acceptance into counteroffer.

5. **Compromise and Settlement - 5(2)**

Settlement of property foreclosure dispute was unenforceable where check sent by record owners contained the words "under protest" and general release stated that record owners were "under extreme pressure" to settle in order to save their land showing that record owners had reservations in their acceptance of settlement.

Charles Roland Haugh, Charles R. Haugh, P.C., Charlottesville, Va., argued (Lair D. Haugh, Charles R. Haugh, P.C. Charlottesvilles, Va., on brief), for defendants-appellants.

J. Benjamin Dick, Law Offices of J. Benjamin Dick, Charlottesville, Va., for plaintiffs-appellees.

Before WIDENER and WILKINSON, Circuit Judges, and HILL, Senior United States Circuit Judge for the Eleventh Circuit, sitting by designation.

WILKINSON, Circuit Judge:

This case raises questions about when enforceable settlement agreements have been formed. The

district court concluded that Barney and Elizabeth Byrum has tendered a valid acceptance to Bear Investment Company's offer to settle their dispute over a parcel of land when the Byrums sent the company a check for the amount specified in the offer and a general release. Although the check sent by the Byrums contained the words "under protest" and the general release stated that the Byrums were "under extreme pressure" to settle in order to save their land, the district court reasoned that these facts did not prevent an enforceable contract from being formed.

We reverse. No contract to settle was formed here because the Byrums' purported acceptance differed markedly from the acceptance terms intended by Bear Investment Company. Although the law certainly encourages

settlements, no litigant should be forced to settle a case on terms that augur future lawsuits. Here, the settlement "under protest" contained within it the seeds of a subsequent challenge to its own enforceability.

I

The Byrums are the record owners of a parcel of land in Louisa County, Virginia. As a result of foreclosure, the property was auctioned to Bear Investment Co. ("Bear") in 1979. Before the foreclosure sale was completed, the Byrums brought suit in state court challenging the foreclosure. In 1983, while that litigation was still pending, the Byrums' attorney solicited a settlement offer from Bear. On December 2, 1983, Bear responded with a letter from its representative, W. W. Whitlock. The letter provided three options for

returning the land to the Byrums in exchange for a sum of money. The letter also provided that the Byrums must execute a complete general release and that they must understand that the settlement was an "effort to help them. If they [the Byrums] do not feel this is true, then we would not want to have any of the above options completed."

The Byrums responded by letter dated December 16 with a check for $3,000 (as specified under Bear's option number one) and a general release enclosed. The letter noted that the check was being "paid under protest." On the front of the check itself was typed "Purpose: to save Byrums Farm & payoff under protest." Also, the release stated that the Byrums were "under extreme pressure" to settle

the case to save their land. Whitlock contends that before he received the check, he telephoned counsel for the Byrums and told him that Bear would not accept a check bearing the words "under protest." Whitlock asserts that Byrums' counsel assured him that the Byrums' check would not contain the offensive wording. The record does not clearly reflect whether the telephone conversation occurred before or after the check was sent.

By letter dated December 20, 1983, Whitlock objected to the wording on the check and on the release. He also returned the check and release. Whitlock indicated in the letter that the "under protest" language should be stricken from the check and that a general release should be executed free of language expressing reservations

about the settlement. Despite Whitlock's efforts and other actions taken by the parties, they never reached a settlement that both sides could agree was satisfactory.

The Byrums eventually brought suit in federal district court, contending that their actions on December 16 constituted a valid acceptance of Bear's December 2 settlement offer. The district court agreed that a settlement agreement had been formed and granted summary judgment for the Byrums, Bear now appeals from that judgment.

II

[1-4] Under governing Virginia law, settlement agreements are treated as contracts subject to the general principles of contract interpretation. Bangor-Punta Operations, Inc. v.

Atlantic Leasing, Ltd., 215 Va. 180, 207 S.E. 2d 858, 860 (1974). The question then of whether an enforceable settlement has been reached is governed by the intent of the parties as objectively manifested. Montagna v. Holiday Inns, Inc., 221 Va. 836, 269 S.E.2d 838, 844 (1980). More specifically, the issue of whether the Byrums' actions on December 16 amounted to a valid acceptance of Bear's settlement offer is controlled by the principle that an acceptance must be unequivocal and unqualified in order to bind the offerer. Nolan Bros., Inc. v. Century Sprinkler Corp., 220 F.2d 726, 728 (4th Cir. 1955). A material variance between the acceptance and the offer results in a rejection of the original offer and transforms the putative acceptance into a

counter-offer, Chittum v. Potter, 216 Va. 463, 219 S.E.2d 859, 863-64 (1975).

[5] In our view, the check and general release sent by the Byrums on December 16 were far from an unequivocal acceptance of Bear's settlement offer. Although Whitlock may not have given specific instructions on how the check was to be drawn until after it was mailed, the Byrums should have realized that the words "under protest" expressed an equivocation about accepting the offer. The Byrums, however, contend that the "under protest" language simply expressed their frustrations and their mental reservations about the offer and as such did not prevent a contract from being formed.

We see two difficulties with this argument. First, the Byrums

contention blurs the distinction between unexpressed mental reservations which generally are irrelevant for contract formation purposes and reservations about an offer written into the acceptance which are relevant to determining whether an acceptance is valid. See Wells v. Weston, 229 Va. 72, 326 S.E.2d 672, 676 (1985). Second, the "under protest" language on the check cannot be analyzed in isolation, but must instead be read in conjunction with the general release.

The language in the release stating that it was executed "under extreme pressure" further expressed the Byrums unwillingness to commit completely to settlement. While Bear's original offer did not specify precisely how the release was to be worded, the inclusion of the challenged language

is obviously at odds with the expressed intent of Bear to have the release executed as a means of ending a vexatious lawsuit once and for all. For example, the paragraph in Bear's December 2 letter discussing the release states that the Byrums were to recognize that the settlement offer was an effort to help them; otherwise Bear did not care to consummate the deal. This part of the offer did not require the Byrums to utter some magic words of appreciation, but it certainly did not invite the Byrums to phrase their release in such a way as to set up a duress or unconscionability claim in the event the settlement was later brought into question.

This is not to say that such claims would be effective or that the Byrums would necessarily assert them

in the future. We are simply recognizing that Bear was negotiating for more than an exchange of land for money; it was also bargaining for an end to an acrimonious dispute over the land. The phrasing of the check and release suggested that Bear might be deprived of the benefit of its bargain because the Byrums remained reluctant to end the dispute and appeared to be angling both for the land in an immediate sense and for the return of their money at some future time. For these reasons, we believe that the reservations expressed by the Byrums in their acceptance prevented an enforceable settlement agreement from coming into existence. See United States v. Newport News Shipbuilding & Dry Dock Co., 571 F.2d 1283, 1286 (4th Cir. 1978).

The Byrums also argued that even if their December 16 actions did

not constitute a valid acceptance, we should consider later negotiations and actions of the parties as evidence that an enforceable settlement contract was formed. Because the district court confined its analysis to the events of December 16 and the record is therefore incomplete on later events, we do not reach the question of whether the parties formed an enforceable agreement at some later time.

III

We recognize that the Byrums have a financial and emotional investment in this disputed parcel of farmland. Yet Bear too has a colorable claim to the land. During the parties' attempts to compromise on these competing claims, the Byrums placed Bear in the position of fearing that it was bargaining away any claim to the land

in return for a future lawsuit by the Byrums if they remained disgruntled. Bear's concerns about future disputes with the Byrums were anything but fanciful, given the relationship between the litigants - a quarrelsome one characterized by repeated allegations of a conspiracy against the Byrums and by two separate suits the Byrums had brought challenging Bear's claim to the land.

While the law encourages settlements, it also recognizes that a party making a settlement offer retains reasonable control over the terms on which it can be accepted. Because the Byrums' purported acceptance on December 16 varied substantially from Bear's original offer, no agreement to settle the suit was formed at that time, and the judgment of the district

court must therefore be reversed and remanded for further proceedings.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

BARNEY L. BYRUM and,
ELIZABETH Y. BYRUM, et. ux.,
BARNEY L. BYRUM, III
SPENCER N. BYRUM,
7706 Tomlinson Avenue
Cabin John, MD 20818
Plaintiffs,

v.

BEAR INVESTMENT COMPANY, a
Virginia Partnership
W. W. WHITLOCK, Agent,
Principal Officer,
W. W. Whitlock Agency,
Inc., General Partner,
Serve at: Main Street
Mineral, VA 23117

and for

RECORD
#88-0853-R

Edward J. Whitlock)
)
Robert A. Whitlock and)
)
Albert G. Johnson)
)
Partners)
)
and)
)
W. W. WHITLOCK, Partner,)
)
Agent, and Personally,)
)
Defendants.)

(NOTE: Complaint does not include attachments here.)

COMPLAINT

COMES NOW the Plaintiffs who for their amended Complaint do state as follows:

JURISDICTION

Jurisdiction is imposed under 28 U.S.C.A. §1332 exclusive of interest and costs.

PARTIES AND BACKGROUND

1) Plaintiffs, domiciled

and residents of Maryland, are co-owners of certain real estate located in the County of Louisa, Virginia, namely 137.653 acres deeded to them on October 2, 1956 from William Katschke as recorded in Deed Book 96 at page 282 of the Clerk's Office of the Circuit Court of Louisa, Virginia and more particularly described by plats of Milton Terry Estates, C.L.S., Inc. of Orange, Virginia dated September 13, 1976. (Attachments "A" and "B".)

2) The Plaintiffs on insistence of their former trial lawyer, pleaded the above described Virginia farm in 1974 as security by way of a deed of trust securing a collateral deed of trust bond, the deed of trust recorded in Deed Book 179 at page 567 in said Virginia Clerk's Office (Attachment "C") to secure an amount

of $5,000.00, the bond and deed of trust executed in favor of their former Virginia trial attorney for "future legal services" which sum was purportedly a total fee not to exceed $5,000.00 (Attachment "D"). The Plaintiffs had paid all of said fee but approximately $1,400.00 which remainder was disputed between attorney and clients due to a claim of excessive fees being charged above the agreed to $5,000.00 represented of said Virginia trial lawyer.

3) Subsequently thereafter, a civil lawsuit by the Plaintiffs' former attorney against the Plaintiffs Barney L. and Elizabeth Y. Byrum was lodged in the Circuit Court of the City of Charlottesville, Virginia for said fees exceeding the agreed to $5,000.00. (See letter of former attorney, Attachment "D".) Said former

Virginia attorney prevailed by way of a state default judgment, in abstentia of the Plaintiffs as reported in Byrum v. Lowe and Gordon, Ltd., 225 Va. 362 (1983), by serving notice of a hearing through the Secretary of the Commonwealth and Certified Mail to addresses at which the Plaintiffs were not to be found.

4) Thereafter, under the trust bond, Plaintiffs' lawyer proceeded to threaten repeatedly to foreclose on the Plaintiffs' Virginia farm given as security to his "future" fees that became the controverted amount of money claimed as attorney fees. This civil controversy between attorney and client never saw the evidentiary nor adversary hearing within the Commonwealth of Virginia due to the default judgment gained and disputed which default

judgment the Virginia Supreme Court upheld pursuant to its statutory procedure.

5) In November of 1979, the Plaintiffs' $55,000.00, trust bond was declared in default by the Plaintiffs' former attorney. Their farm was thereafter advertised for forced auction. Said former counsel then forcefully auctioned in November 1979 the Plaintiffs' farm in abstentia of the Plaintiffs who were totally occupied with a critically injured son in a hospital and who tried to stop the auction with $8,000.00 cash through another attorney. After repeated and frustrated attempts by them to retrieve their farm by proffering multiple offers in settlement and payment plans prior to the auction, all such efforts were rejected and frustrated

by events and circumstances, including offers that far exceeded the $5,000.00 bond, the Plaintiffs were forced with challenging the auction legally and equitably.

6) The forced sale under the deed of trust was declared to be not spirited as verified by the auctioneer; the land and timber in 1979 was appraised by an MIA Appraisor, Carrol Wright, in excess of $120,000.00; in November of 1979 being sold by the trustee, Gary Patterson, on the auction block (a substituted trustee acting under the deed of trust), he knocked the sale out of $31,000.00 under gavel to Bear Investment Company, a Virginia Partnership, represented by A. G. Johnson, a principal and partner who in litigation was substituted by order by the partnership, Bear Investment

Company, which partnership and partners became a party litigant in state proceedings challenging the forced auction.

7) Bear Investment Company, a Virginia Partnership, includes Defendant W. W. Whitlock who is or was at the time of the sale a principal and agent, General Partner through W. W. Whitlock Agency, Inc., and attorney of the same and through A. G. Johnson representing Bear Investment Company, the latter who made the bid at the auction of $31,000.00. W. W. Whitlock also a former attorney of the Plaintiffs and privy to valuable knowledge of the Plaintiffs' auctioned land through a Virginia Power Company condemnation/right of way legal representation for the Plaintiffs. (Barney L. and Elizabeth Y. Byrum.)

8) After the auction, Plaintiffs were able to obtain a state injunction to stop the transfer of the deed by the adverse parties and file a chancery suit in a Court of Equity of the Commonwealth of Virginia to challenge the auction on numerous grounds.

9) The partners of Bear Investment company are publicly listed in Book 2 at page 167 of the partnership Book in the Clerk's Office of the Circuit Court of Louisa County, Virginia, and are W. W. Whitlock Agency, Inc., Edward J. Whitlock, Robert A. Whitlock, and Albert G. Johnson. W. W. Whitlock is a principal and President of W. W. Whitlock Agency, Inc.

10) Spencer N. Byrum, incapacitated, guardian for him being Barney L. Byrum, and Barney L. Byrum

III, sons, all have deeded interests in the subject property and are residents of Maryland.

STATEMENT OF FACTS

11) Defendant W. W. Whitlock on behalf of himself and Bear Investment Company the partnership, litigated in a state chancery proceeding (Circuit Court of Louisa County, Virginia, Chancery Number 2319) Plaintiffs' Barney L. Byrum and Elizabeth Y. Byrum challenge to the forced auction of their Virginia property. The Defendants prevailed over the Plaintiffs' multiple objections to the state sale and did much later, with all other parties, ultimately agreed to a cash settlement as herein set forth below to allow the Plaintiffs to regain back their land from a state court approved deed of trust sale.

12) Defendant Whitlock, for and on behalf of Bear Investment Company and its partners, for himself as partner in W. W. Whitlock Agency, Inc., and for himself personally, continued relentlessly to attempt to seize the land from his former clients regardless of the settlement to which the agreed Defendants had to on behalf of the partnership. At no time in said extended state litigation did a deed to Plaintiffs' land ever pass to Defendants. The auction deposit of $3,000.00 was returned by Court Order and A. G. Johnson substituted as a party with Bear Investment Company. (Attachment "E".)

13) After unsuccessful petitions for appeals to the Virginia Supreme Court challenging legally the forced auction, including the assignment

of errors of a proper notice, the gross inadequate auction price of $31,000.00, and the denial of the right of redemption, the state appeal petitions being summarily denied without awarding an appeal for any state appellate review, the Plaintiffs actively sought a settlement.

14) The Plaintiffs still holding legal title and no title as to the subject property being conveyed, the Plaintiffs effected a settlement between all parties involved with the land sale auction (which involved nearly all Virginia attorneys,) by soliciting from all interested parties in the litigation that they make written offers to Plaintiffs' defense counsel. In December of 1983, offers of settlement communicated to the Plaintiffs were all reduced to a formal writing made

by all interested parties or by their agent and or representatives to the Plaintiffs.

15) With the Plaintiffs' land at risk of being taken pursuant to the state approved sale, pursuant to the written offers in settlement, Plaintiffs' former attorney, who held the original $5,000.00 deed of trust and collateral deed of trust bond noted above, demanded a sum cash in excess of $19,000.00; from the trustee/attorney and his attorney who auctioned the land under the aforesaid deed of trust as security on the said land, they demanded a cash sum of $4,000.00; from Bear Investment company and W. W. Whitlock, they demanded $3,000.00 cash and a release of W. W. Whitlock, Bear Investment Company and many others.

16) All of the written cash demands and terms constituting the

offers were accepted by the Plaintiffs under force and duress to save their land. Pertinent to the instant action, Plaintiffs accepted the written offer of the Defendants to achieve a settlement with the Defendants.

17) The written communications of the noted parties, true copies being here attached, Attachments "F", "G", and "H", Attachment "F" being Bear Investment's demand for $3,000.00 and a release, constituted the offers to which all parties litigating by copy to each other had privy knowledge of the same. The cash demand and release offer in the manner described by Attachment "F" was one of the several offered alternatives by the Defendant W. W. Whitlock and the partnership to the Plaintiffs to settle. The Plaintiffs tendered the cash of $3,000.00

by cashier's check to W. W. Whitlock with his demanded release on December 16, 1983. No form release was provided by said Defendants and a general release was executed and delivered by the Plaintiffs.

18) On December 16, 1983, the Plaintiffs accepting the Defendants offer, tendered the demanded cash sums of money by tender of a cashier's check for $3,000.00 and a release to W. W. Whitlock, by U.S. Certified Mail and also delivered the cash sums demanded by the other attorneys (Attachments "I", "J", and "K", respectively); specifically $19,214.51 cash to the Plaintiffs' former attorney in which a receipt was obtained (Attachment "L"). (On tender of the $19,214.51, contractually the said former attorney and his firm agreed to an "immediate"

release of Plaintiffs' farm property which was agreed to and executed in writing.) The sum of $4,000.00 cash was tendered to the trustee by Certified U.S. Mail. The latter two negotiated their cashier checks made identical except as to payee and amount.

19) The Plaintiffs thereafter heard from the Defendants Bear Investment Company and W. W. Whitlock who refused to abide by the settlement until the Plaintiffs' words "under protest" placed on all cashiers' checks were stricken from his check. The Plaintiffs did strike the words "under protest" on that demand and said Defendants still refused to abide by the settlement making brand new demands and demanded an additional $1,000.00 dollars. The Plaintiffs next filed a motion to enforce the settlement in the state proceeding

and the sitting Judge F. Ward Harkrader, disqualified himself. (The Plaintiffs requesting later that all the judges of said state circuit disqualify themselves due to the Defendant attorneys involved practicing regularly before them, the recusal was granted. The Virginia Supreme Court's Chief Justice then designated the Honorable Henry D. Garnett to sit on the matter.)

20) The Defendants coming before Judge Garnett objected to his jurisdiction under a state theory of procedural rule claiming that he had no jurisdiction, that the forced auction was final, that the sale could not be disturbed except by an independent law suit raising the claimed breach of settlement contract.

21) Overruling the objection to jurisdiction, the Judge Designate,

Henry D. Garnett, sitting in equity, ruled after two independent evidentiary hearings and trials granted to W. W. Whitlock and Bear Investment Company that a settlement agreement had been effectuated by all parties involved with the Plaintiffs. Judge Garnett rendered his opinion twice, a true copy thereof in pertinent part here attached as Attachments "M" and "N".

22) The Defendants thereafter noted a state appeal to said order to the Virginia Supreme Court assigning error that the Judge Designate lacked jurisdiction to hear the settlement motion in that it was final under Rule 1:1 and the matter should be decided by separate and independent trial.

23) By Order of the Virginia Supreme Court dated July 15, 1987, it granted a writ of appellate review

in the first instance to this disputed matter. The Supreme Court granted oral argument on January 11, 1989. (Defendant W. W. Whitlock conceded to Justice Henry D. Whiting at oral argument that the matter could be decided by independent suit even if the Virginia Supreme Court agreed that Judge Garnett lacked jurisdiction.)

24) The Virginia Supreme Court under edict of its published Rule 1:1 altering eons of Virginia equity jurisprudence, Attachment "O", held by final Order of march 3, 1989 that a June 1981 Order was a Final Order and that the court deciding the settlement agreement had no jurisdiction to hear the settlement motion. The Supreme Court declared all subsequent orders after June 5, 1981 in the state matter as being void and of no effect.

For the reason here stated and because this Court has jurisdiction, the Plaintiffs now must proceed with an independent suit.

25) Prior to said decision of the Virginia Supreme Court, on or about January 1985, Defendant W. W. Whitlock did cause a deed of trust released by the deed of trust bond holder, as was contracted for valuable consideration, to be altered in the record room of the Clerk's Office of the Circuit Court of Louisa, asserted here as a violation of Virginia law, causing a cloud on Plaintiffs' title.

COUNT ONE

(Breach of Contract)

The Plaintiffs adopt and incorporate paragraphs 1-25 by reference as a part hereof, all attachments therein

noted, and for their Count One, do state in support thereof as follows:

26) On or about December 2, 1983, after the Plaintiffs approached the Defendants and other attorneys to not take their Virginnia land, to settle the disputed matter because it was their lifetime investment, the Defendants offered to settle the dispute between the Plaintiffs by alternatives enumerated as "options" in a letter of even date (Attachment "F") incorporated here by reference and made a part hereof which included additionally that a release be made of a certain number of entities therein described, constituting or including all partners and others, regardless of the option taken, and that $3,000.00 cash be tendered, the same constituting a written offer to the Plaintiffs.

27) The said settlement contract offer was supported by adequate consideration, mutuality of purpose and negotiated at arms length betweeen the parties and at all times constituted a written settlement offer contract.

28) On or about December 16, 1983, the Plaintiffs accepted the offer, tendered $3,000.00 cash by cashier's check and tendered an executed release of the parties as requested using a Certified U.S. Mail for delivery to the said Defendants and the Plaintiffs thereby did fully perform the settlement contract.

29) On or about December 20, 1983, the said Defendants breached the contract and refused the release and the cash as agreed upon due to the words "under protest" being on the same. Demanding such words be

struck, the Plaintiffs being under force and pressure did so. Defendants nevertheless continue the breach.

30) The Plaintiffs due to said breach have been greatly damaged, incurred a sizable debt, and interest, the loss of the use of their land for nearly six years, great expense, inconvenience, and attorney fees.

COUNT TWO

(Intentional Breach of Contract)

For Count Two of their Complaint, adopting paragraphs 1-30 and the Statement of Facts, Count One, all attachments herein recited, the Plaintiffs pray that the judgment be entered against the Defendant Bear Investment Company and W. W. Whitlock, jointly and severally, and in support thereof do state as follows:

31) Defendants Bear Investment Company, W. W. Whitlock, a general partner pursuant to his W. W. Whitlock Agency, Inc., and personally, and as agent for Bear Investment Company binds the principal's grant of actual authority, did wrongfully cause and did undertaken efforts, acts, and omissions to in bad faith breach intentionally, and does continue to date, to breach the settlement contract.

32) After the original breach and demanding that the Plaintiffs strike the words "under protest" from the cashier's check and the release, which the Plaintiffs under force and coercion did, the Defendants further demanded under force, coercion and duress that the Plaintiffs execute yet another written release drawn solely by W. W. Whitlock for the Defendants which

the Plaintiffs to save their land did, and the Defendants thereafter continued in bad faith, willfully and wantonly, to disregard the original settlement contract made and all other demands met with a reckless and callous disregard as to the Plaintiffs' contractual rights, their land, and their well being and did continue to make never ending demands including an apology to all parties and litigants which outrageous demands the Plaintiffs finally refused to do. Plaintiffs did record the releases which they signed under force and coercion in the land record books and in good faith fully performed the settlement contract and all demands.

33) Said willful, intentional and wanton breach by the Defendants promoted by a reckless and wanton disregard for Plaintiffs rights under

the settlement contract was and does continue to damage the Plaintiffs and their Virginia land by causing them consequential damages, great mental anguish, loss of profits and rents from their land, considerable expense and attorney fees.

COUNT THREE

(Injury to Real Property)

For Count Three of their Complaint, adopting paragraphs 1-33 Count One and Two and the Statement of Facts, the Plaintiffs pray for judgment against the Defendants jointly and severally and in support thereof do state as follows:

34) By said unilateral act, without a court order and contrary to Virginia law, Defendants through W. W. Whitlock did wrongfully act

and directly cause a state record room deed book release to be visibly altered by hand of other third parties on the said record room land books so to cloud and injure the real property title of all of the Plaintiffs and thereby casting a cloud on the said Plaintiffs' land and upon their marketable title, and, to date said wrongful acts are both continuous, unabating, and endorsed and ratified by the affirmative acts of said Defendants and partners.

35) As a direct and proximate result of said injury to said realty, the Plaintiffs were and do continue to be thereby damaged and have been and are continuing to be considerably damaged and inconvenienced losing rents and profits from the land for an on-going six years since December 16, 1983, losing the enjoyment of the use of

their land, as real property owners, and the loss of all gainful opportunities and incidents related to the land, and have incurred great expense and attorney fees.

COUNT FOUR

(Third Party Interference With Contract Effecting Injury to Real Property)

For Count Four of their Complaint adopting paragraphs 1-35 and the Statement of Facts, Counts One, Two, and Three, all attachments therein, said Plaintiffs pray that judgment be entered against the Defendants jointly and severally and in support thereof, they do state as follows:

36) The Plaintiffs procured a contractual arrangement with their

former attorney for the payment of $19,214.51 cash to him in return for a receipt (Attachment "L") here adopted by reference as a part herein in which he agreed to "immediately" release the deed of trust on payment given him that included the demand that the trustee's demanded fees be also paid and which all said cash amounts were paid. (Attachment "J", the Receipt.)

37) The Plaintiffs demanded that the deed of trust be thereby released "immediately" and some 12 to 14 months after making this contractual settlement agreement, the bond holder and former counsel finally released the deed of trust in accordance with Virginia law and as he had contractually obligated himself to do in every way.

38) Thereafter, the Defendant

W. W. Whitlock did personally cause through others to go to the said deed record room and to alter the release contrary to Virginia law and without a Court order so as to effect a cloud upon Plaintiffs' marketable title to their real property.

39) In so doing said wrongful act, the Defendants interfered with the contract between the Plaintiffs and their former counsel for ulterior motives and the Defendants did so in bad faith when Defendants were otherwise fully obligated to a contractual settlement agreement.

40) Defendants had actual knowledge of the contract between the Plaintiffs and their former trial attorney and did cause its breach by an intentional third party interference effecting an injury on the Plaintiffs'

realty and title of record in the Courthouse.

41) Defendants interference with the said contract was an intentional action and the direct and proximate cause of the breach to alter the contract by said former attorney who with counsel made a notation post facto that the release was not a release.

42) Defendants conduct was consummated when it had no privilege to the contract and were bound to a settlement contract of their own.

43) Plaintiffs as a result of said interference to the contract incurred actual losses, damages, loss of the use of their property, loss of rents and profits, and suffered great inconvenience and other consequential damages and attorney fees.

COUNT FIVE

(Recission of Releases to Defendants; Fraud; Order of Specific Performance)

For Count Five, Plaintiffs pray that the releases executed to the Defendants' favor and their principals by Barney L. Byrum and Elizabeth Y. Byrum be rescinded or declared null and void for fraud by the equitable power of this Court in that the releases were secured in bad faith, and the Defendants having violated the settlement agreement, their failure to perform under the settlement agreement, and for obtaining the second release under duress, force, coercion and fraud, no less than forfeiture of the releases is appropriate and just. In support of the fraud claim to rescind the releases, the Plaintiffs do say as follows:

A. Fraud

44) The Defendants by its representative and agent W. W. Whitlock, and W. W. Whitlock personally and as agent with actual authority and as partner as a principal officer of W. W. Whitlock Agency, Inc., did make a material misrepresentation that if the Plaintiffs' struck the words "under protest" from their cashier's check and the executed release made pursuant to the settlement when they had no obligation to do so, that the Defendants would be satisfied.

45) The material representation proved to be false and misleading.

46) The Plaintiffs relied upon the material representations and were seriously damaged thereby incurring great costs, loss of profits and rents,

pain and suffering, and attorney fees.

B. Recission of Second Release and Forfeiture of First Release.

47) The Defendants secured a second release from Barney L. and Elizabeth Y. Byrum on further false promises that if executed, the Defendants would perform the settlement contract as agreed upon.

48) The Defendants material representations proved to be false and misleading and thereafter new demands were made including excessive cash demands and an executed written apology which Plaintiffs refused.

49) The Plaintiffs pray that the court by its equitable power rescind or declare void all releases executed by the Plaintiffs in that they were secured by fraud or in bad faith or that said releases were secured

for unjust and improper bad faith purposes resulting in a forefeiture of the same under the law of contract.

PRAYER FOR DAMAGES

AND RELIEF

COMES NOW the Plaintiffs and pray that upon judgment against the Defendants, jointly and severally, for the Counts pleaded, that a jury be impanelled; that the Court enter an order of recission on all releases executed as stated in Count Five for the reasons there stated or declare the same void; that the Court hold that a settlement contract was effected and Order that Defendants cease and desist from further attempting to take Plaintiffs' Virginia land by any means whatsoever; and that for compensatory and consequential damages pursuant

to all counts, the collective sum for all counts that $500,000.00 be awarded to the Plaintiffs by judgment; and for their bad faith, malice, and all wrongful and intentional acts, a collective sum of $350,000.00 be awarded against the Defendants to the Plaintiffs in punitive damages; that interest on compensatory damages be awarded from December 16, 1983, and that the Plaintiffs be awarded the Plaintiffs' costs, and all attorney fees expended.

BARNEY L. BYRUM
and for
BARNEY BYRUM, III
& SPENCER N. BYRUM,
as Guardian,

ELIZABETH Y. BYRUM
and for
BARNEY BYRUM, III
& SPENCER N. BYRUM

Signed By: J. BENJAMIN DICK
Counsel for Plaintiffs
421 Park Street, #2
Charlottesville, VA 22901
(804) 977-6607

Certificate

I certify that true copies of the Amended Complaint were mailed postage pre-paid to W. W. Whitlock, Principal Officer of W. W. Whitlock Agency, Inc., General Partner at Main Street, Mineral, Virginia 23117 and for all partners of Bear Investment Company, a Virginia Partnership this 13th day of April, 1989.

Signed: J. BENJAMIN DICK

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

BARNEY L. BYRUM, et. al.,

Plaintiffs,

v. CA #88-853-R

BEAR INVESTMENT CO., et. al.,

Defendants.

ANSWER

COMES NOW the Defendants and in Answer to the Amended Complaint filed against them herein, respectfully represent as follows:

[TO PARTIES AND BACKGROUND]

1. As to paragraph 1 thereof Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of whether Plaintiffs are domiciled and residents of Maryland and call for strict proof

of same; they deny that Plaintiffs are co-owners of subject real estate situate in Louisa County, Virginia; they deny that Plaintiffs, Barney L. Byrum III and Spencer N. Byrum were named Grantees in the deed from William Katschke; and they are without sufficient knowledge or information to form a belief to the truth or falsity of whether the plats referred to accurately describe subject real estate.

Hereafter, Plaintiffs Barney L. and Elizabeth Y. Byrum, will be referred to as Byrum, and the Defendant, Bear Investment Company and its partners will be referred to as Bear.

2. As to paragraph 7 thereof, they deny that W. W. Whitlock, was or it's a general partner of Bear; and admit that W. W. Whitlock was attorney for Bear.

3. They admit the allegations contained in paragraph 9 thereof.

4. They do not have knowledge or information to form a belief as to the truth or falsity of the allegations contained in paragraph 10 thereof, but deny that Spencer N. Byrum and Barney L. Byrum, III have legal title to subject real estate.

[AS TO STATEMENT OF FACTS]

5. They deny the allegations contained in paragraph 11 thereof.

6. As to paragraph 14, they admit that negotiations took place between Byrums and Bear; they expressly deny that any settlement was effected; and, they deny the remaining allegations contained therein.

7. As to paragraph 15, they deny that Bear and W. W. Whitlock demanded $3,000.00 cash and a release;

the remaining allegations require no response by Defendants in accordance with the Memorandum and Order herein dated June 15, 1989, are denied.

8. They deny the allegations contained in paragraph 16 thereof to the effect that a settlement was achieved between the parties.

9. As to paragraph 17 thereof, they deny that Bear made an unconditional offer to Byrums to settle; they admit receipt of a $3,000.00 check and purported release from the attorney for Byrums, but aver that the same were rejected by Defendants as not in accord with any offer made; they deny the remaining allegations.

10. They deny the allegations concerning acceptance contained in paragraph 18 thereof insofar as Defendants are concerned; the remaining

allegations require no response from Defendants, in accordance with the Memorandum and Order herein dated June 15, 1989, and are denied.

11. They deny the allegations as to settlement contained in paragraph 19 thereof insofar as Defendants are concerned; they admit that negotiations took place and that the words "under protest" were not acceptable to Bear; the remaining allegations require no response from Defendants, in accordance with the Memorandum and Order herein dated June 15, 1989, are denied.

[AS TO COUNT ONE]

12. They deny the allegations of paragraph 26 thereof excepting that Bear's attorney wrote Byrums attorney on December 2, 1983, setting forth several proposals for discussion aiming toward a settlement between the parties,

a copy of which letter is attached hereto as Exhibit 1.

13. They deny the allegations contained in paragraph 27 thereof.

14. They deny the allegations contained in paragraph 28 thereof excepting that they admit that Byrums, through their attorney, sent a $3,000.00 cashier's check and a purported release to Bear's attorney, which documents were received by Bear's attorney on December 19, 1983, and rejected.

15. They deny the allegations contained in paragraph 29 thereof, excepting that they admit writing Byrums' attorney on December 20, 1983.

16. They deny the allegations contained in paragraph 30.

17. Defendants aver and allege that Bear, through its attorney, after being solicited to do so by Byrum's

attorney, submitted certain proposals to Byrum by letter dated December 2, 1983.

These proposals, all conditioned upon certain other actions by the parties as hereinafter set forth, were as follows:

A. That Bear would agree to the entry of a Dismissed-Agreed Order in the Louisa County, Virginia Circuit Court Chancery Suit, upon payment of the sum of $3,000.00 by Byrum in the form of a certified check, provided that Bear would not be required to take title to subject real estate and that no further court appearances would be necessary; or

B. That if Bear had to take title to subject real estate it would convey the property to Byrums for the sum of $4,000.00 plus costs of obtaining

the property, provided Byrum obtained and paid for a title insurance policy for Bear; or

C. That if Bear had to obtain the title insurance policy itself that it would convey the subject real estate to Byrum for the sum of $5,000.00 plus the cost of obtaining the property.

The above proposals, or options as referred to in the aforesaid letter, were expressly conditioned upon (i) Bear's accepting the proposal selected by Byrums; (ii) upon Byrum accepting and recognizing the fact that Bear had done nothing to them and that Bear was taking these actions only to help the Byrums; and (iii) that Byrum execute a general release to Bear and the individuals named in the aforesaid letter.

18. On December 16, 1983,

Bear's attorney, having been advised that the Trustee had received a check from Byrum for costs and expenses marked paid "under protest", immediately telephoned Byrums attorney and told him that there wasn't any use sending any check down showing that it would be under protest; that they wanted the settlement to be based on the statements in their letter that it was to be free and voluntary on their part (the Byrums'), and in an effort to be helpful to the Byrums.

Byrums' attorney replied and assured Bear that they would not receive any check under protest; it wouldn't be on their check, and that he would mail it or he would send his secretary to bring it.

19. On December 19, 1983, Bear's attorney received by certified

restricted delivery mail, a letter from Byrums' attorney dated December 16, 1983, attached hereto as Exhibit 2, simply stating "On your demand, $3,000.00 paid under protest. With the required Release written by the Byrums personally".

Enclosed was a check and release both marked "under protest".

20. By letter dated December 20, 1983, attached hereto as Exhibit 3, with Plaintiffs Response to Defendant's Motion to Dismiss, Bear's attorney returned the check and release for the reasons previously stated in the aforesaid telephone conversation of December 16, 1983, and as repeated in said letter.

21. That Byrums did not attempt to, nor did they ever comply with the options, proposals and

conditions set forth in the aforesaid letter of December 2, 1983, nor in the telephone conversation of December 16, 1983.

22. That the parties never arrived at a meeting of the minds and did not enter into a binding contract.

23. That the contract, as alleged by Byrums, if valid would obligate Bear to agree to the entry of a Dismissed-Agreed Order in a Chancery suit in the Circuit Court of Louisa County, Virginia and not for a conveyance of the land or a release of their rights under the foreclosure sale.

24. That the specific options or conditions that would have obligated Bear to convey subject real estate to the Byrums, as set forth in the aforesaid letter of December 2, 1983, were never chosen or ever referred

to by the Byrums.

25. That at the time of the alleged breach of contract, and thereafter, the Circuit Court of Louisa County was without jurisdiction to enter any such Dismissed-Agreed Order under the Virginia Rules of Court.

26. That Defendants did not breach any written or oral contract with Byrums, and specifically allege that they have had no dealings whatsoever with Barney L. Byrum, III and Spencer N. Byrum.

27. That the damages claimed in paragraph 30 thereof do not flow from the breach of contract alleged and Defendant's allege that Plaintiff's have suffered no damage in the premises.

28. Defendants specifically deny each and every allegation of the Amended Complaint not expressly admitted

herein, in accordance with the Memorandum and Order herein dated June 15, 1989.

FIRST AFFIRMATIVE DEFENSE

No valid and binding contract was entered into between the parties.

SECOND AFFIRMATIVE DEFENSE

The contract as alleged, is invalid and unenforceable because of impossibility of performance.

THIRD AFFIRMATIVE DEFENSE

The terms allegedly accepted by Plaintiffs, even if included in a valid contract, would not and do not settle the question of the ownership of subject real estate and do not give rise to this cause of action and the damages claimed herein, and therefore, there was a failure of consideration.

FOURTH AFFIRMATIVE DEFENSE....

PLAINTIFF'S CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS.

BEAR INVESTMENT CO.
EDWARD J. WHITLOCK
ROBERT A. WHITLOCK
ALBERT G. JOHNSON
W. W. WHITLOCK

By Counsel

Charles R. Haugh, P.C.
435 Park Street
Charlottesville, VA 22901
(804) 296-0185
Signed: CHARLES R. HAUGH

CERTIFICATE

I hereby certify that a copy of the foregoing was mailed or delivered to J. Benjamin Dick, 421 Park Street, Suite 2, Charlottesville, VA 22901.

This the 20th day of June, 1989.

Signed: CHARLES R. HAUGH

COLLATERAL DEED OF TRUST

This deed made this 22nd day of April, 1974, by and between Barney L. Byrum, Jr. and Elizabeth Byrum, hereinafter referred to in the aggregate as the Grantor; and Hartwell H. Gary, III and Edward L. Hogshire, of Charlottesville, Virginia, Trustees;

WITNESSETH:

That for and in consideration of the provisions of this deed and of Five Dollars cash in hand paid by the said Trustees to the Grantor, receipt of which is hereby acknowledged, the said Grantor hereby GRANTS, BARGAINS, SELLS and CONVEYS unto said Trustees, with GENERAL WARRANTY and TITLE, all that real property located in the State of Virginia and described as follows: all that certain tract or parcel of

land located in Jackson Magisterial District, in the County of Louisa, containing 120 acres, more or less, lying on the waters of Henson's Creek, and adjoining the land now or formerly owned by B. F. Foster, G. P. Hamilton, J. A. Duke, G. L. Simms, and others, and certain appurtenant easements of right of way, being the same land and rights of way conveyed to the Grantor by deed of William Katschke and Mary C. Katschke, husband and wife, by deed dated September 15, 1956, and recorded in the Clerk's Office of the Circuit Court of Louisa County in Deed Book 96, page 282.

IN TRUST NEVERTHELESS, to secure a certain debt of the said Grantor in the sum of Five Thousand Dollars ($5,000.00) evidenced by one (1) Collateral Deed of Trust Bond bearing

even date with this deed payable on demand to Lowe and Gordon, Ltd., a Virginia Corporation, bearing interest from demand at the rate of eight (8) percentum per annum until paid. Said bond is given interest obligations of the Grantor to Lowe and Gordon, Ltd. in the form of promissory notes given prior to or subsequent to the execution of said bond and this deed of trust, up to an aggregate of no more than the amount secured by this deed of trust. Said bond contains a waiver of homestead exemption by the Grantor.

The said Grantor covenants as by statute in this case made and provided except as herein otherwise expressly set out:

1. Renewal or extension permitted.

2. Insurance required to the full insurable value of all improvements upon said property whether now or subsequently erected.

3. In the event of default in the payment of said debt or any installment of interest thereon or any part of said debt or interest or in the event of the breach of any covenant entered into or imposed by this deed then upon request of any holder of the collateral deed of trust bond hereby secured, the Trustees, either of whom is authorized to act in the absence, refusal or incapacity of the other so to do, may take possession of the property hereby conveyed and shall proceed to sell the same at public auction; advertisement required being three weeks by handbills posted in the Circuit Court of the

County or City in which is situated the real estate hereby conveyed. Such sale shall be upon the following terms: cash as to so much of the proceeds as may be necessary to defray expenses of executing this trust including a Trustees' commission of five percentum of the gross proceeds of sale and to discharge the amount of the debt hereby secured unpaid, which is to be then paid whether due at that time or not and if there be any residue, the same shall be made payable at such time and secured in such manner as the said Grantors, their heirs or assigns shall in writing prior to advertisement direct, or in case of failure to give such direction, as the Trustees shall think fit.

In the event of a fire and the Trustees are required to disburse

fire insurance proceeds or in the event the Trustees are requested to sell the property described and the bondholders thereafter request the sale to be called off, the Grantor agrees to pay the Trustees a reasonable fee for services rendered in connection with the proposed sale.

Witness the following signature and seal the day and year first above written.

/s/ BARNEY BYRUM (SEAL)

/s/ELIZABETH BYRUM(SEAL)

RELEASE

WE, Elizabeth Y. Byrum, and Barney L. Byrum under our own hands do here write this agreement in order to save our land in Louisa County held under a deed of trust by our former attorneys, John C. Lowe, for future legal fees and being under extreme pressure to do the following to save our land to prevent John Lowe from forcefully selling our land, we do agree under protest to pay the purchaser of our land at the forced auction of November 19, 1979 so ordered by John C. Lowe and his fellow attorneys working for him, the purchaser being Bear Investment Company who has not yet taken title nor has the Circuit Court of Louisa County reinstated its vacated and suspended order confirming the sale, the SUM OF THREE THOUSAND DOLLARS BY

CERTIFIED CHECK FROM THE TRUST ACCOUNT OF J. Benjamin Dick hand-delivered to W. W. Whitlock, Esq. and pursuant to his letter received by our counsel on December 5, 1983 and as W. W. Whitlock demands in said letter, we further agree to release from all claims only the following people and legal entities so described in W. W. Whitlock's letter, namely, W. W. Whitlock Agency, Inc., E. J. Whitlock, Jr. and Robert A. Whitlock, A. G. Johnson, W. W. Whitlock and Bear Investment Company.

GIVEN AND DIRECTED BY OUR HANDS THIS 13th day of December, 1983.

/s/Elizabeth Y. Byrum

/s/Barney L. Byrum

STATE OF VIRGINIA AT LARGE

CITY OF CHARLOTTESVILLE, to wit:

Subscribed and acknowledged before me by Elizabeth Y. Byrum and Barney L. Byrum the 13th day of December, 1983.

My commission expires:

/s/Joan C. McPherson
Notary Public

RELEASE

WE, Elizabeth Y. Byrum, and Barney L. Byrum under our own hands do here write this agreement in order to save our land in Louisa County held under a deed of trust by our former attorneys, John C. Lowe, for future legal fees and being under extreme pressure to do the following to save our land to prevent John Lowe from forcefully selling our land, we ~~do--agree--under--protest~~ are forced to pay the purchaser of our land at the forced auction of November 19, 1979 so ordered by John C. Lowe and his fellow attorneys working for him, the purchaser being Bear Investment Company who has not yet taken title nor has the Circuit Court of Louisa County reinstated its vacated and suspended order confirming the sale, the SUM OF THREE THOUSAND DOLLARS BY

CERTIFIED CHECK FROM THE TRUST ACCOUNT OF J. Benjamin Dick hand-delivered to W. W. Whitlock, Esq. and pursuant to his letter received by our counsel on December 5, 1983 and as W. W. Whitlock demands in said letter, we further agree to release from all claims only the following people and legal entities so described in W. W. Whitlock's letter, namely, W. W. Whitlock Agency, Inc., E. J. Whitlock, Jr. and Robert A. Whitlock, A. G. Johnson, W. W. Whitlock and Bear Investment Company.

GIVEN AND DIRECTED BY OUR HANDS THIS 13th day of December, 1983.

/s/Elizabeth Y. Byrum

/s/Barney L. Byrum

STATE OF VIRGINIA AT LARGE

CITY OF CHARLOTTESVILLE, to wit:

Subscribed and acknowledged before me by Elizabeth Y. Byrum and Barney L. Byrum the 13th day of December, 1983.

My commission expires:

/s/Joan C. McPherson
Notary Public

COLLATERAL DEED OF TRUST BOND

$5,000.00 Date: April 22, 1974

The undersigned makers promise and bind ourselves and our successors, heirs, assigns, to pay on demand to Lowe and Gordon, Ltd., a Virginia Corporation, Five Thousand Dollars ($5,000.00) with interest thereon from demand at the rate of eight (8) percentum per annum until paid.

This Collateral Deed of Trust Bond is given as collateral to secure certain underlying principal and interest obligations in the form of one or more promissory notes of the makers of this bond payable to Lowe and Gordon, Ltd. This bond shall serve as collateral for all notes of the makers whether executed prior to or subsequent to the execution of this bond, in the

aggregate amount of no more than the face value of this bond.

This bond is secured by a deed of trust of even date from the makers to Hartwell H. Gary, III, and Edward L. Hogshire, of Charlottesville, Virginia, Trustees, conveying property in Louisa County, Virginia, to secure the obligation of this bond. The makers hereby waive the benefit of homestead exemption as to this obligation.

Witness the following signatures and seals.

/s/BARNEY BYRUM (Seal)

/s/ELIZABETH BYRUM (Seal)

W. W. WHITLOCK, P.C.
Attorneys and Counsellors at Law
P. O. Box 128
Mineral, Virginia 23117

December 2, 1983

Mr. J. Benjamin Dick
Attorney at Law
421 Park Street
Charlottesville, VA 22901

Dear Ben:

This is to confirm our telephone conversation with you and Mr. Arnold today whereby I advised that I got BEAR Investment Company to agree to my recommendation as follows, which we are making because we sympathize with the Byrums and the problem they have in reference to their property,

although, certainly so far as BEAR Investment Company and I'm concerned, we have done nothing to create any problem for them but tried to be helpful in that BEAR Investment Company bid more for their property than any other person was willing to pay for it, and secondly, throughout these proceedings, I have constantly recommended to you and them settlement arrangement that could and should have been accepted years ago.....

In any event ..... BEAR Investment Company will agree to any of the following:

1. If this case can be disposed of without further Court appearances and without BEAR Investment Company having to take title to this property, BEAR Investment Company would agree to have a Dismissed-Agreed Order

entered in this case upon payment in cash or by certified check the sum of $3,000.00 payable to BEAR Investment Company, which we feel is only an adequate amount to cover the time and expenses that the Byrums have caused BEAR Investment Company and those of us involved with BEAR Investment Company.....

Regardless of which of these options may be accepted by the Byrums, we would require from the Byrums a complete general release to BEAR Investment Company, W. W. Whitlock Agency, Inc., E. J. Whitlock, Jr., Robert A. Whitlock, A. G. Johnson and W. W. Whitlock from any cause or claim of any kind from the beginning of time to the present and the consideration for the release would be that BEAR Investment Company accept whatever

one the above options are accepted. Please understand and have the Byrums understand that we are not asking for the release because we think that any possible claims are in existence, but we want to make certain that the Byrums clearly understand that the above action is taken for the above-stated reason and in an effort to help them. If they do not feel this is true, then we would not want to have any of the above options completed.

I am sending a copy of this letter to other counsel, so that they may know our position, and I would appreciate your turning a copy of this letter over to both Barney L. Byrum and Elizabeth Y. Byrum.

Sincerely yours,

/s/W. W. WHITLOCK

WWW/ct

cc: Mr. Richard W. Arnold, Jr.
Attorney at Law
P. O. Box 276
Louisa, VA 23093

Mr. John C. Lowe
Attorney at Law

R. W. ARNOLD, JR.
Attorney at Law
P. O. Box 276
Louisa, Virginia 23093

December 2, 1983

Mr. J. Benjamin Dick
Attorney at Law
421 Park Street
Charlottesville, VA 22901

Re: My file Number R.80.3514
Byrum v. Patterson

Dear Mr. Dick:

This will confirm that we are proceeding on December 6, 1983, at 9:30 a.m. as scheduled with that court appearance and our conference of December 2, 1983, included, the total needed by the trustee to balance

his costs of sale is $4,000.00.

Sincerely,

/s/RICHARD W. ARNOLD,JR.

RWAJR/mjw
cc: Mr. W. W. Whitlock
Mr. John C. Lowe
Mr. Gary B. Patterson

SHIER'S CHECK — United Virginia Bank

14 22257

16 Dec. 1983

TO THE ORDER OF Patterson & Richard Arnold, Attorneys * * * $4,000.00 * * *

DOLLARS

PURCHASER Dick, Attorney

Under Escrow Agreement

"140222571" :051401865:: 00 04 332" 35'000040000"

Attorneys
Endorsement is release and satisfaction of demand
Printed fee — 0 expense.

Gary B Patterson
VA DL 226-77-6280

GARY PATTERSON, Esq. /:
Trustee
Richard Arnold
Richard M. Arnold, Jr.

RICHARD ARNOLD, ESQ.

Called Richard Arnold to verify SS.
ok - no stop payment in effect

10 : 3

10 1 DE '83 20 PM

UNITED VIRGINIA BANK
FAIRFAX, VA
PAY ANY BANK

LOWE, GORDON, JABOCS & SNOOK, LTD.

Attorneys and Counsellors at Law

409 Park Street

Charlottesville, Virginia 22901

December 5, 1983

J. Benjamin Dick, Esquire

421 Park Street

Charlottesville, VA 22901

Dear Ben:

After talking with you Friday afternoon, I realized that I had made a mistake. Taking the initial judgment of $13,319.44, rendered on May 24, 1979, we should be calculating interest at no less thatn 8%, since that was the rate called for in the promissory notes. Therefore, the 6% judgment rate in effect until July, 1980, doesn't

really matter. With that revision, I calculate the total due in principal and interest to be $18,918.72, assuming payment is made on Tuesday, December 6, 1983. To that figure should be added the following costs and attorney's fees, as provided by the Virginia Supreme Court:

1. An attorney's fee of $50.00.

2. Costs of printing the brief of $90.00.

3. Filing fees, service fees and other allowable court costs associated with the Charlottesville suit (only the second one) of $60.50.

4. Filing fees and other allowable court costs relating to Louisa County suit of $51.50.

This gives a total amount due of $19,190.72 to be paid to Lowe,

Gordon, Jacobs and Snook, Ltd. Of course, I do not know that amounts may be due to the Trustees, though my reading of the deed of trust would indicate that they are entitled to 5% of the gross sales price as their fee, plus other costs that may have incurred.

I look forward to receiving this money from you, so that we may call this case closed.

Sincerely yours,

/s/J.LLOYD SNOOK,III

JLS/kt

THE
PAY TO THE ORDER OF * * John C. Lowe, Attorney * * * * * * * * * * * * * * * $12,214.51 * *

16 Dec 1983

UNITED VIRGINIA BANK

DOLLARS

HASER J.B. Dick, Attorney

e Byrum' Farm & payoff
cer p-ocest

"140222594" :051401851: 00 04 332"

ase and debt satisfied
full

John C. Lowe

JOHN C. LOWE, Attorney
Lowe and Gordon, Ltd.

FOR DEPOSIT ONLY.
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PAY ANY BANK
UNITED
VIRGINIA
BANK
VIRGINIA

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J. BENJAMIN DICK

Attorney at Law

421 Park Street

Charlottesville, Virginia 22901

December 16, 1983

John C. Lowe, Esq.

409 Park Street

Charlottesville, VA 22901

Dear John:

On your demand, your duly acquired money paid by your former clients under protest in full.

Have a Merry Christmas and do not be surprised if you see the Ghosts of Christmas Past.

Of Counsel,

/s/J. Benjamin Dick

JBD/JEM
Enclosure (1 check)
cc: Mr. and Mrs. Byrum

ASHIER'S CHECK

United Virginia Bank

14 22259

16 Dec 33

Y TO THE
RDER OF * * * John C. Lowe, Attorney * * * * * * * * * * * * * * * 5**19,214.51**

UNITED VIRGINIA BANK Nineteen thousand two hundred fourteen and 51/100 DOLLARS

PURCHASER J.B. Dick, Attorney

save By sums Farm & payoff
under protest

"14022259" "051401065" 00 01 33 2"

19-

145

55

J. BENJAMIN DICK

Attorney at Law

421 Park Street

Charlottesville, VA 22901

December 16, 1983

Richard Arnold, Jr., Esq.

Attorney at Law

Post Office Box 276

Louisa, VA 23093

Dear Richard:

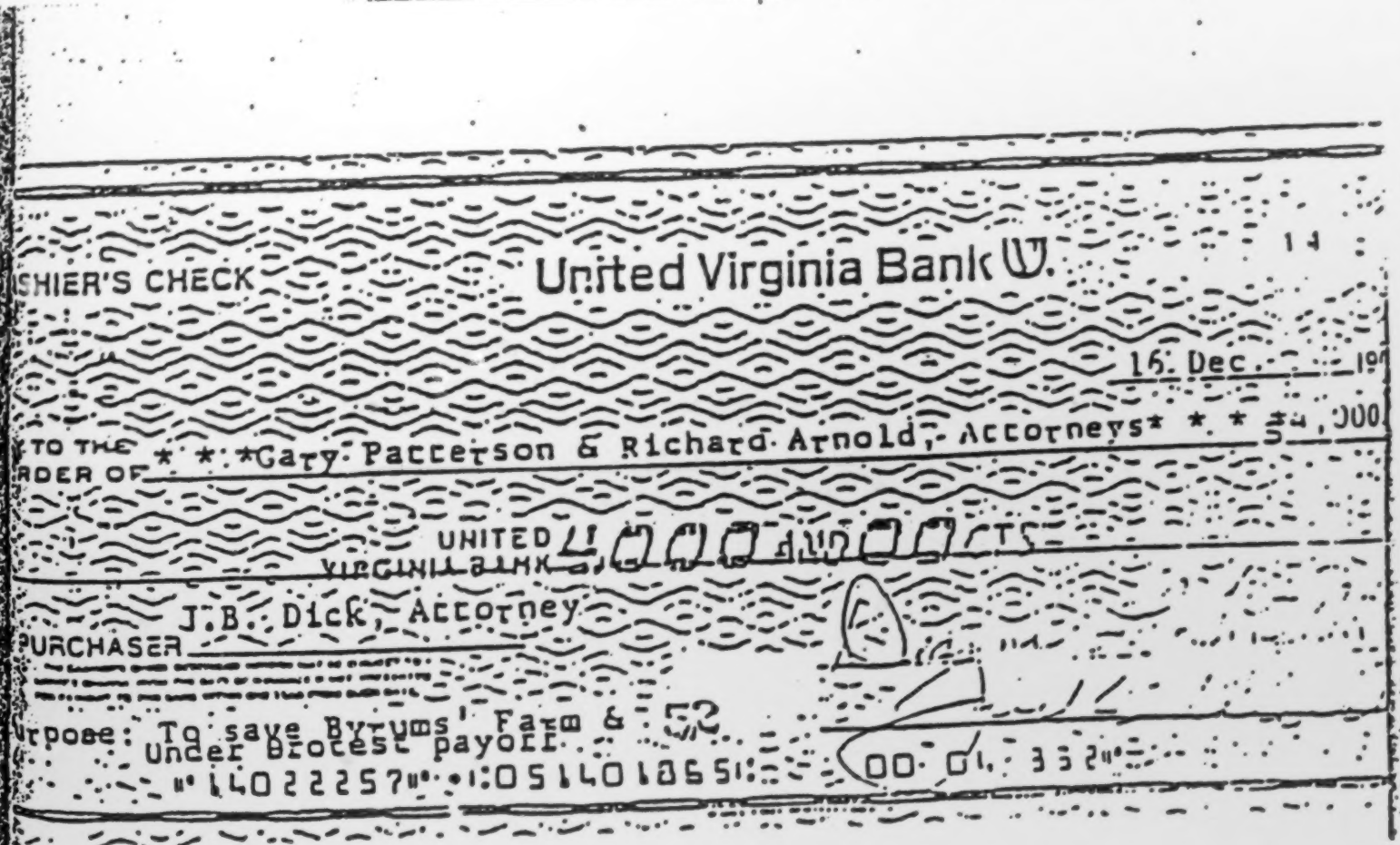
On your demand $4,000.00 paid under protest. Congratulations.

Have a Merry Christmas with your money.

OF COUNSEL

/s/ J. Benjamin Dick

JBD/jem
Enclosure (1 check)


SHIER'S CHECK

United Virginia Bank

16 Dec 19

TO THE ORDER OF * * *Gary Patterson & Richard Arnold, Attorneys* * * $4,000

UNITED VIRGINIA BANK

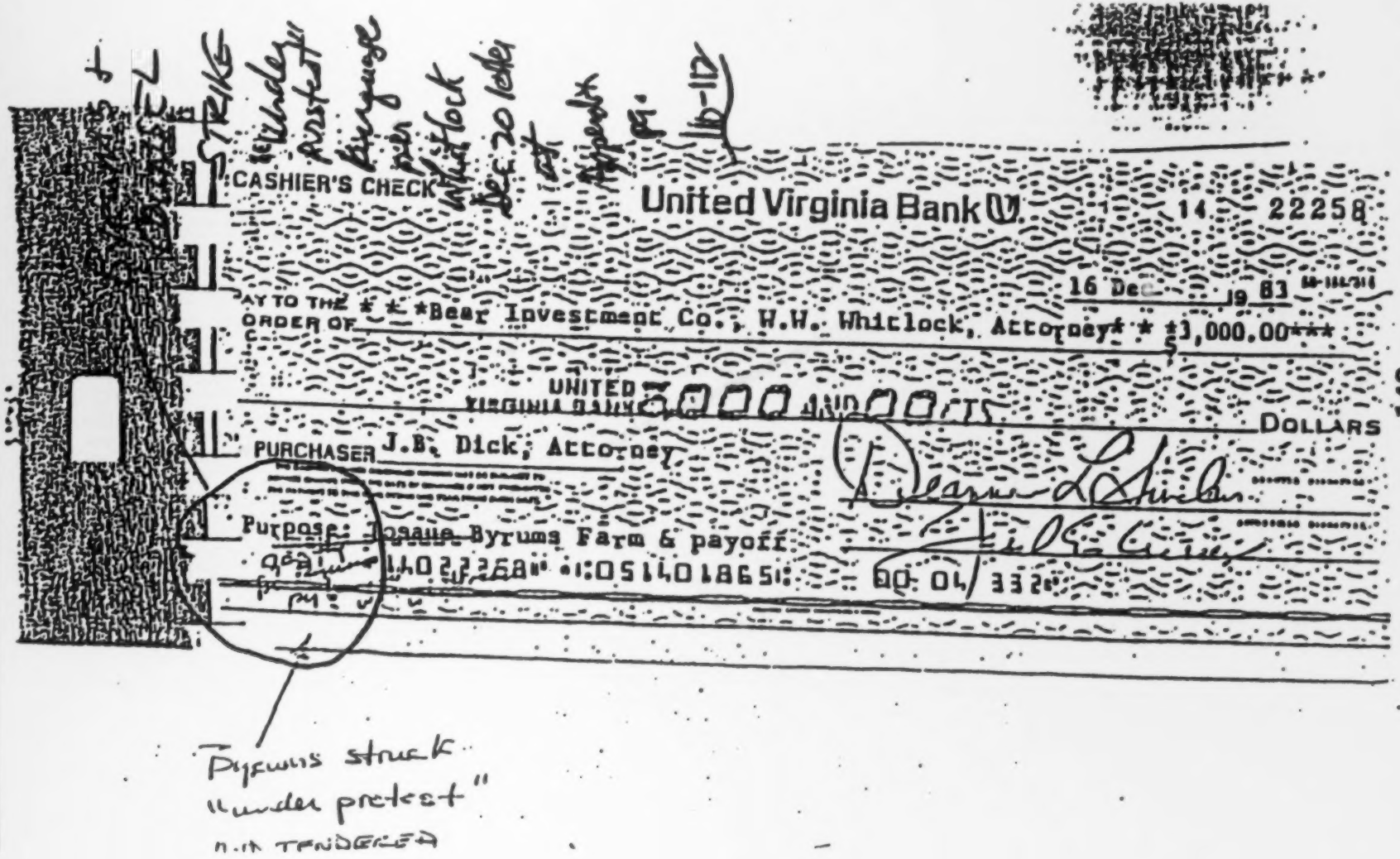
J.B. Dick, Attorney

PURCHASER

Purpose: To save Byrums' Farm & 52
Under Protest payoff

"140225?" :051401865: 00 01 332"

147


CASHIER'S CHECK
United Virginia Bank
14 22258
16 Dec 19 83
PAY TO THE ORDER OF * * *Bear Investment Co., W.H. Whitlock, Attorney* * *3,000.00***
UNITED VIRGINIA BANK
3,000 AND 00 CTS
DOLLARS
PURCHASER J.B. Dick, Attorney
Purpose: Tonsue Byrums Farm & payoff
Byrums struck "under protest"
148

7

SHIER'S CHECK United Virginia Bank 14 222

16 Dec 19 83

Y TO THE * *Beat Investment Co.; W.W. Whitlock, Attorney* * $1,000.00***

ORDER OF

UNITED VIRGINIA BANK ONE THOUSAND AND 00/100 DOLL

PURCHASER J.B. Dick, Attorney

47

Purpose: Toggle Byrums Farm & payoff.

⑈140222588⑈ ⑆051101665⑆ 00 01/332⑈

149

IN THE CIRCUIT COURT OF LOUISA COUNTY

BARNEY L. BYRUM,	)	
	)	
ELIZABETH Y. BYRUM,	)	
	)	
Plaintiffs	)	
	)	
	)	Chancery
	)	
vs.	)	Number 2319
	)	
GARY B. PATTERSON,	)	
	)	
Trustee, etl als.,	)	
	)	
Defendants.	)	

FINAL ORDER

Came this matter to be heard upon the argument of counsel that the above cause be dismissed by consent of the parties in that the parties have consented to a settlement agreement which terms are hereby represented to the court:

a) That the law firm of Lowe and Gordon, Ltd. be paid the cash

sum of $19,214.51 by cashier's check representing the default judgment amount with interest from the date of judgment being the full amount of the judgment entered on May 24, 1979, by the Circuit Court of the City of Charlottesville, which amount was paid as evidenced by an executed receipt made by Lowe and Gordon, Ltd. attached to this Order.

b) That the cash sum of $4,000.00 by cashier's check be tendered to Gary B. Patterson, Trustee, for the trustee's fees and expenses and which sum by endorsement of counsel for the trustee, receipt of said amount is hereby acknowledged by the Trustee.

c) That the cash sum of $3,000.00 by cashier's check be tendered to Bear Investment Company in care of their attorney, W. W. Whitlock, whose endorsement to this Order

acknowledges receipt thereof, and that a general release be executed by the Plaintiffs, which release is annexed to this Order duly executed by Plaintiffs as to specific persons and entities enumerated by W. W. Whitlock, counsel for the purchasers and which the Court is requested to incorporate into this Order as part thereof.

And the above was represented as the settlement by counsel and the court was requested to enter an order in view of the above to dismiss this cause.

The Court having duly considered the above and the representations by counsel for the parties, DOTH APPROVE the settlement and does hereby ORDER that this cause be DISMISSED and the cause be stricken from the regular docket this _____

day of January, 1984.

_____

Entered

_____

JUDGE

WE ASK FOR THIS:

/s/J. BENJAMIN DICK
Counsel for Elizabeth Byrum
and Barney L. Byrum

/s/RICHARD W. ARNOLD, JR.
Counsel for Gary B. Patterson

/s/J. LLOYD SNOOK, ESQ.
Counsel for Lowe and Gordon,Ltd.
(Now Lowe, Gordon, Jacobs, & Snook

W. W. WHITLOCK
Counsel for Bear Investment Co.

W. W. WHITLOCK, P.C.
ATTORNEYS AND COUNSELLORS AT LAW
P. O. BOX 128
Mineral, Virginia 23117

December 20, 1983

Mr. J. Benjamin Dick
Attorney at Law
421 Park Street
Charlottesville, VA 22901

Dear Mr. Dick:

I received your check in the amount of $3,000.00, payable to BEAR Investment Company and W. W. Whitlock, Attorney, and note that someone has typed on the check "Under protest".

Your letter of December 16, 1983, also, indicates that the $3,000.00 is being paid under protest.

I called your office and

left word with your Secretary that settling this case with your using the words "Under protest" is not satisfactory to us...

Also, permitting the Byrums to prepare the Release with the language used in the Release is not satisfactory. I cannot understand an Attorney attempting to handle this matter in that manner.

I am enclosing a General Release that we will need to have the Byrums execute, with them clearly knowing and understanding that this releases any possible claim that can be made by any of the parties therein from any matter that they may dream about making a frivolous claim against any of us...

Your Secretary called me yesterday and said that she would be

coming to my office today to strike from the check the words, "Under protest". I would prefer to have this check re-issued with this wording eliminated, however, it appears that this wording probably was added after the check was issued. If this is true, I would be willing to accept the check if this wording is struck from it by whoever put it on there, being you or the Byrums, and their initialing this change, and assuming that the check will clear through the Bank with this change being made...

I am enclosing a Release that we have prepared, which I feel makes certain that we will have no further foolish claims made against any of us by the Byrums. If they desire to settle this case, then as a part of the settlement, this Release is

to be executed. In addition to signing the last page and having the signature notarized, I desire to have Mr. and Mrs. Byrum, also, initial the other two pages in the margin where I have drawn a line.

I am sending a copy of this letter to Mr. Arnold, and, also, advising him by telephone that we need to have these further details cleared before we are willing to endorse any Order dismissing the pending case...

Sincerely yours,

/s/ W. W. WHITLOCK

WWW/eb
Encl.
cc: Mr. R. W. Arnold, Jr.

R. W. ARNOLD, JR.
Attorney at Law
P. O. Box 276
Louisa, Virginia 23093

January 12, 1984

Mr. J. Benjamin Dick
Attorney at Law
421 Park Street
Charlottesville, VA 22901

Re: My file number R.80.3514
Byrum v. Patterson
Chancery No. 2319

Dear Mr. Dick:

If your clients will not execute the release requested by Mr. Whitlock and the release requested by Mr. Patterson, then it appears to me the judge will confirm the sale of the property. So, if your clients

are willing to let this happen, please let me know immediately so that the $4,000.00 being held in escrow by the trustee may be returned to your clients. All trustee's fees and expenses of the trustee in executing the trust will be taken from the sale when the proceeds are paid into the trustee from the sale to BEAR Investment Co. with the remainder of the funds to be sent to you as attorney for Mr. and Mrs. Byrum.

Sincerely,

/s/RICHARD W. ARNOLD,JR.

RWAJR/mjw
cc: Mr. John C. Lowe
Mr. W. W. Whitlock
Mr. Gary B. Patterson

STATE COURT BENCH TRIAL

TRANSCRIPT EXCERPT
DECEMBER 16, 1985

PAGE 77, PART THEREOF.

CROSS-EXAMINATION

By Mr. Dick:

Q. Mr. Johnson, were you aware on January 9, 1984, that Mr. and Mrs. Byrum struck the words "under protest" on the certified check, and tendered it again to Mr. Whitlock?

A. Was I aware of that?

Q. Yes.

A. Yes, I was.

TO ALL TO WHOM THESE PRESENTS SHALL COME OR MAY CONCERN, GREETING:

Know ye, that Elizabeth Y. Byrum and Barney L. Byrum, for and in consideration of BEAR Investment company, a Virginia Partnership; W. W. Whitlock Agency, Inc., a Virginia Corporation, for itself and as Partner of BEAR Investment Company; E. J. Whitlock, Jr., individually and as Partner of BEAR Investment Company; Robert A. Whitlock, individually and as Partner of BEAR Investment Company; A. G. Johnson, individually and as Partner of BEAR Investment Company; W. W. Whitlock as our former Attorney and otherwise, accepting the sum of Three Thousand ($3,000.00) DOLLARS, in cash, said sum to be paid to the said BEAR Investment Company and W.

W. Whitlock, their Attorney, and upon the agreement of the said BEAR Investment Company agreeing to release its right to purchase a certain tract of land owned by the undersigned in Louisa County, Virginia, that was sold on or about November 19, 1979, at a Public Auction Foreclosure Sale, at which sale, A. G. Johnson, as Agent and Partner of BEAR Investment Company, was the high bidder, and for other good and valuable consideration received by the undersigned, the undersigned have remised, released and forever discharged, and by these presents do for our heirs, executors and administrators, remise, release and forever discharge the said BEAR Investment Company, a Virginia Partnership; W. W. Whitlock Agency, Inc., for itself and as Partner of BEAR Investment Company, E. J. Whitlock,

Jr., individually and as Partner of BEAR Investment Company; Robert A. Whitlock, individually and as Partner of BEAR Investment Company; A. G. Johnson, individually and as Partner of BEAR Investment Company; W. W. Whitlock, individually and as former Partner of BEAR Investment Company and as our former Attorney, and all heirs, executors, administrators, employees, or representatives of any of said entities, of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, premises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or in equity, against

or that could possibly be made against any and all of said parties by the undersigned, or that they ever had, now have or which their heirs, executors or administrators, hereafter can, shall or amy have, for upon, or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of these Presents.

We have freely and voluntarily entered into this Release, after seeking advice of counsel and freely acknowledge that we never had any claim against any of the parties released herein or have been fully satisfied for any and all claims that could possibly be made, as aforesaid.

IN WITNESS WHEREOF, We have hereunto set our hands and seals this 18th day of January, 1984.

/s/ELIZABETH Y. BYRUM

/s/BARNEY L. BYRUM

STATE OF VIRGINIA AT LARGE,

CITY OF CHARLOTTESVILLE, To-Wit:

Subscribed and acknowledged before me, by Elizabeth Y. Byrum and Barney L. Byrum, this 18th day of January 1984.

My commission expires on the 21st day of February 1987.

/s/JOAN E. McPHERSON

Notary PUblic

Supreme Court, U.S.
FILED
FEB 4 1993
OFFICE OF THE CLERK

No. 92-1181

In The

Supreme Court of the United States

October Term, 1992

BARNEY L. BYRUM, *et al.*,

Petitioners,

vs.

BEAR INVESTMENT COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LAIR DAYTON HAUGH
Counsel of Record
CHARLES R. HAUGH
HAUGH & HAUGH, P.C.
Attorneys for Respondents
435 Park Street
Charlottesville, Virginia 22902
(804) 296-0185

3212
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TABLE OF CONTENTS

	Page
Statement of the Case	1
Opinions Below	2
Statement of Facts	4
Summary of Argument	8
Reasons for Denying the Writ	9
I. The Circuit Court's decision was correct under the law and facts.	9
A. Summary Judgment Was Proper Under Federal Rule of Civil Procedure 56.	9
B. The Circuit Court's Decision Was Based on Virginia Law.	10
C. Federal Rule of Civil Procedure 8 Is Not Applicable to the Pleadings in this Case.	11
D. Byrum Is Not Entitled to a Trial by Jury.	12
E. Summary Judgment for Bear is Proper.	13
Conclusion	19

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Barney L. Byrum et al., Appellees, v. Bear Investment Company et al., Appellants, 936 F.2d 173 (4th Cir. 1991) 3, 4, 10, 12, 15

Forbes & Co. v. Southern Cotton Oil Co., 130 Va. 245, 108 S.E. 15 (1921) 13

Pollar v. Columbia Broadcasting System, 368 U.S. 464 (1962) 13

Virginia Hardwood Lumber Co. v. Hughes, 140 Va. 249, 124 S.E. 283 (1924) 17

Rules Cited:

Federal Rules of Civil Procedure:

Rule 8 ..... 8, 11

Rule 8(c) 11

Rule 56 ..... 8, 9, 10, 13

Supreme Court Rules:

Rule 10 ..... 8, 10, 13, 19

Rule 10(1)(b) 10

Contents

Page

Rule 10(1)(c) 12

Rule 42(2) 19

Other Authority Cited:

Virginia Constitution, Article I, Section 11 13

APPENDIX

Appendix A — Excerpts: Byrums' Brief to Virginia Supreme Court 1a

Appendix B — Excerpts: Louisa Circuit Court Preceedings on February 15, 1984 ..... 4a

Appendix C — Excerpts: Louisa Circuit Court Proceedings on December 16, 1985 ..... 6a

Appendix D — Excerpts: Louisa Circuit Court Proceedings on April 14, 1986 ..... 9a

Appendix E — Notice Recorded by Byrum with Other Documents on January 18, 1984 ..... 15a

Appendix F — Letter: Dick to Whitlock Dated February 10, 1984 ..... 17a

Appendix G — Statement Withdrawing Allegations Prepared by Whitlock on February 15, 1984 ..... 19a

No. 92-1181

In The

Supreme Court of the United States

October Term, 1992

BARNEY L. BYRUM, *et al.*,

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vs.

BEAR INVESTMENT COMPANY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The issue before The Fourth Circuit Court of Appeals (hereinafter Circuit Court) was whether the parties subsequent to December 16, 1983, entered into a contract to settle the matter in controversy between them.

Petitioners' (hereinafter Byrum) Petition contains a great deal of matters not relevant to the issue before the Circuit Court or this

Court (*i.e.*, reasons why Byrums land was subjected to foreclosure found on page 8).

The Petition contains misstatements of fact, (*i.e.*, that Byrums previous attorney's legal fees were never to exceed $5,000, page 13 (*see* terms of security instrument Byrums' appendix, pages 130-131).

The Petition recites facts not in evidence (*i.e.*, that the Byrums put $8,000 in a shoe box to settle, page 14, and that the real estate is likely to have a value of over one million dollars, page 11).

Further, Byrum's statement is composed mostly of arguments and the allegations contained therein are not referenced to any authority or documentation.

OPINIONS BELOW

Byrum, *pro se*, on December 16, 1988, filed a five count complaint, later amended to add counsel, in the District Court for the Eastern District of Virginia, Richmond Division (hereinafter District Court) against appellees (hereinafter Bear) for breach of an alleged settlement contract seeking damages for breach thereof and specific performance (Byrum App. 67).

On June 15, 1989, after a June 7, 1989 hearing, the District Court granted Bears' Motion to Dismiss Counts 2, 3, 4, and 5 of the Amended Complaint, and denied the Motion as to Count One (Byrum App. 18).

On June 7, 1989, prior to the aforesaid hearing, Byrum filed a Motion For Summary Judgment as to Count 1 of the Amended Complaint, which count was grounded on simple breach of contract.

On June 28, 1989, without a hearing, the District Court, by Order and Memorandum Opinion, found that the parties had entered into a contract or agreement on December 16, 1983, and granted Byrums' Motion For Summary Judgment as to Count One.

Bear filed a Notice of Appeai to this Order and the Circuit Court, by opinion entered on June 20, 1991, in the case of *Barney L. Byrum et al., Appellees, v. Bear Investment Company et al., Appellants,* 936 F.2d 173 (4th Cir. 1991) (hereinafter *Byrum I*) reversed the District Court's Order and remanded the case to said District Court for further hearing to determine whether the parties entered into a contract or agreement subsequent to December 16, 1983 (Byrum App. 50). Byrum I is now final and binding between the parties.

Thereafter both parties filed Motions For Summary Judgment.

Byrum, in their Motion For Summary Judgment, alleged that a contract or agreement had been entered into between the parties when on January 9, 1984, they struck the words "under protest" from the check, and tendered the same to Bear, and when on January 18, 1984, they executed and recorded the release prepared by Bear on December 20, 1983.

Bear's Motion For Summary Judgment alleged that the parties never entered into a contract or agreement subsequent to December 16, 1983.

On December 3, 1991, the District Court, without a hearing, found that the parties entered into a contract or agreement subsequent to December 16, 1983, and not later than February 10, 1984, and entered an Order denying Bear's Motion For Summary Judgment and granting Byrum's Motion For Summary Judgment (Byrum App. 23).

Bear filed a Notice of Appeal to that Order and the Circuit Court, by unpublished opinion entered on August 10, 1992, (hereinafter *Byrum II*) reversed The District Court's Order and remanded the case to said District Court with instructions to enter Summary Judgment for Bear (Byrum App. 4).

STATEMENT OF FACTS

The parties hereto have been involved in litigation since 1979 over Bear's purchase of Byrum's Louisa County real estate at public auction foreclosure sale on November 19, 1979 (Byrum App. 55).

During the period from December 1983, through early 1984, Byrum and Bear, conducted settlement negotiations in an effort to resolve the matters in controversy. These negotiations were conducted through counsel, J. Benjamin Dick, hereinafter "Dick", for the Byrums, and W.W. Whitlock, hereinafter "Whitlock", for Bear.

On December 2, 1983, Whitlock wrote Dick setting forth certain proposals and conditions for settlement (Byrum App. 132).

Dick responded by letter dated December 16, 1983, enclosing a check and release, which check and release contained terms not in accordance with the terms of Whitlock's letter of December 2, 1983.

The Circuit Court in *Byrum I* found that no contract was formed on December 16, 1983, because Byrum's response of that date varied substantially from such offer (Byrum App. 54).

Whitlock responded to Dick's December 16, 1983, letter by letter dated December 20, 1983, rejecting Dick's tender; restating settlement terms, and, enclosing a form of general release that

Byrums were required to sign before the proposed settlement could be reached. Whitlock also returned Dick's check and release (Byrum App. 57).

On January 9, 1984, Dick and Whitlock again met, and according to Dick, Dick again tendered the original release, slightly amended (Byrum App. 127), and the original check with the words "under protest" stricken therefrom. At that time Dick made no response to Whitlock's letter of December 20, 1983 (Bear App. 3a).

The re-tender by Dick on January 9, 1984, was rejected by Whitlock who insisted that the terms set forth in his letter of December 20, 1983, including the execution by the Byrums of the release sent them on December 20, 1983, be complied with before any settlement could be reached (Bear App. 3a).

The purpose of the January 9, 1984 meeting was the presentation of a decree to the Louisa Circuit Judge for entry, which decree would direct conveyance of the land to Bear (Bear App. 7a).

The court, at that time, would not entertain talk of settlement but announced that it would continue the matter until January 18, 1984, at which time the court would enter the decree ordering conveyance of the land to Bear, unless there was presented to him by January 18, 1984, a settlement order endorsed by all counsel (Bear App. 8a, 10a).

On January 18, 1984, no court was held as scheduled and all counsel, except counsel for Byrum, were so notified (Bear App. 7a, 10a).

Dick and the Byrums traveled to Louisa on that day for the

purported entry hearing only to find that the scheduled hearing had been called off (Bear App. 7a, 10a).

Having been advised that unless a settlement was reached and a settlement order presented for entry on that day, the court would enter an order directing conveyance of the land to Bear which action would terminate any negotiations then being conducted for a dismissed-agreed settlement order, Byrum, without notice to or the knowledge of Bear or Whitlock, executed and recorded in the Louisa Circuit Court Clerk's Office the release required by Bear along with various and sundry other documents, (Bear App. 10a-13a), including a notice (Bear App. 15a) and the previous release prepared by Dick and rejected by Whitlock (Byrum App. 127).

The release executed on January 18, 1984 was never tendered to Bear and the fact of its recordation was unknown to Bear until some time thereafter (Bear App. 10a, 17a).

Further, no check was tendered to Bear on January 18, 1984 and no provision was made to tender the check to Bear in the future.

Dick on cross-examination, in the Circuit Court of Louisa County, explained why no provision was made for the payment of money on January 18, 1984.

> Q (By Whitlock) Well, you didn't leave any money with the clerk.
>
> A. You-we tendered the check to you two times and you returned it back two times.
>
> It's not my fault that you returned it back.
>
> Q. Why would you think it important to come down here and record this document without

making some arrangements about the money?

A. We'd given you a check twice, Mr. Whitlock, and you gave it back to us.

(Bear App. 8a).

Dick wrote Whitlock on February 10, 1984, informing him that the requested release had been executed and recorded even though doing that "offended" the Byrums greatly. Dick wrote that "the original is in my hands and I will file it with the court". Dick further wrote that "As I have tendered the $3,000.00 check twice and you have given back to me twice, I feel you do not want the money and I think your action to not take the money would be gracious. The Byrums certainly need the money far worse. . ." (Bear App. 18a).

Dick's letter did not inform Whitlock of the other instruments recorded on January 18, 1984 (Bear App. 17a-18a).

On February 15, 1984 the parties again met through counsel and continued negotiations.

Whitlock having become aware of the nature of the documents recorded by the Byrums on January 18, 1984, including the Notice (Bear App. 15a) expressing their feelings about settling the matters in controversy, added additional terms to Bears' settlement offer, including an apology in the form of a written "Statement Withdrawing Allegations" (Bear App. 19a-20a) which offer and terms the Byrums refused (Bear App. 2a).

Byrums never tendered payment of any amount to Bear after January 9, 1984, either by cash or check (Byrum App. 39).

SUMMARY OF ARGUMENT

The Order of the Circuit Court reversing the District Court's Summary Judgment Order in favor of Byrum and remanding the case to the District Court with instructions to enter Summary Judgment in favor of Bear should be upheld.

The issue decided by the Circuit Court was whether the parties after December 16, 1983, entered into a contract to settle a private matter in controversy between them.

Both parties filed Motions For Summary Judgment under Fed. R. Civ. P. 56 in the District Court because no genuine issue of fact was in dispute. All agreed that only a legal question remained to be decided by the courts.

Neither party objected to the court's deciding the issue on their Motions For Summary Judgment.

Byrum's complaint is not that the Circuit Court did not follow Fed. R. Civ. P. 56, only that Bear's Motion For Summary Judgment was granted.

During the course of these proceedings in the lower courts, Byrum never suggested that the court in deciding the issue was not following Virginia contract law; or, that they were entitled to a trial by jury on the issue; or, that Fed. R. Civ. P. 8 was applicable to the pleadings in this case.

The issue decided by the Circuit Court does not involve conflicting federal decisions, constitutional rights or matters of importance to the public generally as specified in Supreme Court Rule 10.

REASONS FOR DENYING THE WRIT

I.

THE CIRCUIT COURT'S DECISION WAS CORRECT UNDER THE LAW AND FACTS.

For purposes of argument, Byrums' question I and II have been combined and then broken down into subparts.

A. Summary Judgment Was Proper Under Federal Rule of Civil Procedure 56.

Rule 56 provides for Summary Judgment if the evidence shows "that there is no genuine issue as to any material fact in dispute and that the moving party is entitled to a judgment as a matter of law."

Here both parties filed Motions For Summary Judgment raising the question of whether after December 16, 1983, Byrum and Bear, through a series of negotiations, offers and counter-offers, ever entered into a contract to settle the matter in controversy between them.

Now, Byrum argues that there was a material issue of fact in dispute (Petition p. 33). The material fact in dispute, according to Byrum being "that the Byrums repeatedly tendered the money only to have it thrown in their faces" (Petition p. 30).

The actions of the parties subsequent to December 16, 1983, *viz.* Whitlock's letter to Dick dated December 20, 1983 (Byrum App. 154); Dick's oral response to Whitlock on January 9, 1984 (Bear App. 3a); Whitlock's response to Dick thereafter on January 9, 1984 (Bear App. 3a); Dick's actions and conduct on January 18, 1984 (Bear App. 10a-14a); Dick's letter to Whitlock dated

February 10, 1984 (Bear App. 17a); and, the actions and statements of Dick and Whitlock on February 15, 1984 (Bear App. 2a), are not in dispute.

The only matter in dispute is the legal effect of these communications and actions under Virginia Law.

Byrum, in its Petition, argues both sides of the question presented by arguing that the District Court followed Rule 56 (Petition p. 31) but that the Circuit Court did not (Petition p. 32).

Byrum is really only complaining about the result obtained in the Circuit Court and not that Rule 56 was not followed.

The Circuit Court followed federal procedure, rules and case law and there is no important or special reason for a review of that decision by this Court. Sup. Ct. R. 10.

B. The Circuit Court's Decision Was Based on Virginia Law.

The Virginia state law applicable to the formation of contracts is cited and quoted in *Byrum I*, 936 F.2d 173, 175 and referred to in *Byrum II* (Byrum App. 13).

Byrum's argument that in *Byrum I* the Circuit Court altered state law (Petition p. 33) is not only incorrect but ignores the fact that the opinion in *Byrum I*, entered on December 3, 1991, is a final and binding decision as to these parties and is the law of the case.

The decision of the Circuit Court was based on the facts and Virginia law of contracts and is a correct decision.

Accordingly, there is no reason for a review of that decision under Rule 10(l)(b) of the Supreme Court.

C. Federal Rule of Civil Procedure 8 Is Not Applicable to the Pleadings in this Case.

Rule 8(c) provides that in certain matters, including "payment" a party shall set forth such defense affirmatively in its pleading.

Byrum failed to raise this point in either the District Court or the Circuit Court prior to filing its motion to reconsider in the Circuit Court.

The issue raised in this case in the lower courts was whether, based on a series of offers and responses, a contract was entered into between the parties subsequent to December 16, 1983 (Byrum App. 7).

Bear has always maintained that no contract was entered into because Byrums never met any offer made by Bear while that offer was on the table (Byrum App. pp. 104-116).

One of the essential terms of each offer made by Bear involved the payment of a sum of money to Bear by Byrum, and one of the failures of Byrum to effectively accept Bear's various offers was their failure to tender such sum in accordance with Bear's then outstanding offer.

Byrum has misconstrued Rule 8 because this case was not a contract action for money that Bear could defend by pleading that payment had already been made.

This case has been through a hearing on a motion to strike in the District Court; two orders for summary judgment in the District Court; and, two hearings in the Circuit Court without any mention or objection by Byrum to Bear's failure to plead payment or non-payment under Rule 8, even if the Rule pertained to the facts of this case.

The decision of the Circuit Court is not in conflict with applicable decisions of this Court. Sup. Ct. R. 10(1)(c) .

D. Byrum Is Not Entitled to a Trial by Jury.

Byrum filed two Motions For Summary Judgment against Bear in the District Court and the District Court granted both motions.

The first Summary Judgment Order was reversed by the Circuit Court in *Byrum I.*

The second Summary Judgement Order was reversed in *Byrum II.*

No mention of, or claim to the right of trial by jury was raised by Byrum throughout any of the lower court's proceedings.

The question now raised by Byrum is whether a federal court, without violating either parties' right to trial by jury, has authority to grant Summary Judgment for one party in a case in which both parties moved for Summary Judgment on the same facts.

The issue between the parties and considered and determined by lower courts was whether after December 16, 1983, Byrum and Bear, through a series of negotiations, offers and counter-offers, ever entered into a contract to settle the matter in controversy between them.

Byrum has pointed out no fact in dispute. Both the District Court and the Circuit Court found and agreed that no material fact was in dispute.

Since there is no genuine issue of material fact in dispute the action of the lower courts in granting Summary Judgment under

Rule 56 does not violate Byrums right to trial by jury under the United States Constitution. *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962).

The Virginia state constitutional provision for trial by jury is applicable only to state cases and Byrum instituted this action in the federal court.

In any event, Virginia state law is the same as federal law on this point and the grant of Summary Judgment does not violate Article I, Section 11 of the Virginia Constitution. *Forbes & Co. v. Southern Cotton Oil Co.*, 130 Va. 245, 108 S.E. 15 (1921).

There is no constitutional issue in this case to be reviewed by this Court under Rule 10 of the Supreme Court.

E. Summary Judgment for Bear is Proper.

As hereinbefore mentioned, the applicable Virginia law of contracts, offers, counter-offers and acceptances was applied by the Circuit Court on undisputed facts.

Bear's original offer terms set forth in the December 2, 1983 letter (Byrum App. 137) and rejected by Byrum's response of December 16, 1983, were restated and enlarged or altered in a new offer by Bear contained in its December 20, 1983 letter (Byrum App. 154).

Bear's new offer of December 20, 1983, consisted of the following terms:

1. Byrums were to select one of the 3 options set forth in the December 2, 1983 letter.

2. Submit that selection to Bear.

3. Byrums were to affirmatively indicate in some manner that they understood that Bear had done nothing to them and that Bear was engaging in this course of conduct to help the Byrums.

4. Byrums were to execute and tender the general release prepared by Whitlock and forwarded to them on December 20, 1983.

5. Byrums were to tender the sum of $3,000 by certified check without the words "under protest".

6. Byrums were to have no reservations about the settlement.

7. Byrums were not to attempt to settle with Bear under protest.

8. There were to be no further court hearings.

Byrum's first response to this offer of December 20, 1983, came on January 9, 1984, when they struck the words "under protest" from the $3,000 check and Dick tendered the check to Whitlock together with a release previously executed by the Byrums on December 13, 1983, and altered and initialed by them on January 9, 1984 (Byrum App. 127).

Except for the striking of the words "under protest" from the $3,000 check, the terms of Bear's offer, including execution of the release prepared by Whitlock that was sent to Dick on December 20, 1983 (Byrum App. 161), were intentionally ignored because Dick believed that "Mr. Whitlock would come around when we struck the words "under protest" on the check" (Bear App. 5a).

Under the law, Byrum's response of January 9, 1983, constituted a counter-offer and rejection of Bear's offer, which counter-offer was immediately rejected by Bear (Bear App. 3a), and the Circuit Court so found (Byrum App. 14).

Thereafter, on that same date, Bear again offered to settle with Byrum on or before January 18, 1984 in accordance with the terms set forth in Whitlock's letter of December 20, 1983 (Byrum App. 154), but Byrum failed to accept the terms thereof in the required manner (Byrum App. 15).

Byrum's first reaction or response to Bear's counter-offer of January 9, 1984, came on January 18, 1984, the date set for performance.

On that date, without Bear's knowledge or consent and without notice to Bear, Byrum executed the release prepared by Whitlock and recorded the same in the Louisa County Circuit Clerk's Office.

This release and other and sundry instruments were attached to and recorded with a Notice signed by Dick as counsel (Bear App. 15a-16a).

Among the documents recorded on January 18, 1984, was the release tendered to and rejected by Bear on January 9, 1984 (Byrum App. 127).

The notice, reciting that Byrums "submit to these demands to save their land and do so under force and pressure", and the two releases attached thereto strongly indicate a lack of acceptance by Byrum of the terms of Bears then existing offer.

The language of these documents are similar to the language disapproved by the Circuit Court in *Byrum I*.

No check was tendered to Bear on January 18, 1984 and no provision was made to tender the check to Bear in the future. (Bear App. 8a).

All parties to this action agree that unless Byrum accepted Bears' latest offer prior to January 18, 1984, the date set by the state court for further hearing, that the option under consideration was off and that Bear would go ahead and take title to the disputed land.

According to Whitlock, to consummate an agreement to settle in accordance with Option No. 1, the Byrums "had to execute the release I prepared, without it being under protest; it being a voluntary act on your part —accompanied by certified check of the amount you were to pay by January 18, 1984." (Bear App. 13a-14a).

Dick agreed, testifying that there would be no such agreement "unless we met your demands by January 18th —your new demands, and demands made after December 16th." (Bear App. 8a).

The Byrums' response on January 18, 1984, constituted a counter-offer to Bear and a rejection of the January 9, 1984, offer.

Byrums' second response to Bear's January 9, 1984 offer came on February 10, 1984, when Dick wrote Whitlock informing him that Byrums had executed his required release and had recorded the same on January 18, 1984, the original being "in my hands and I will file it with the court." (Bear App. 17a).

According to Dick's letter, the execution of that release by the Byrums "offended them greatly."

The original executed release was never tendered to Whitlock.

Dick's letter did not inform Whitlock of the other notices or documents recorded on January 18, 1984, which documents indicated again that Byrum's actions were not voluntary.

No money was tendered by Dick in his February 10, 1984 letter, and no promise was made therein to agree to pay the money or tender the same to Bear in the future.

On the contrary, Dick wrote:

> As I have tendered the $3,000.00 check twice and you have given back to me twice, I feel you do not want the money and I think your action to not take the money would be gracious. The Byrums certainly need the money far worse as they are over-ridden with many other financial and human hardships. . . .

(Bear App. 18a).

The law of Virginia is very definite and controls the parties' actions in this case.

In *Virginia Hardwood Lumber Co v. Hughes,* 140 Va. 249, 257, 124 S.E. 283 (1924), the Court wrote:

> The offerer has a right to prescribe in his offer any conditions as to time, place, quantity, mode of acceptance, or other matters . . . ., and the acceptance must in every respect meet and correspond with the offer . . . exactly meeting them at all points and closing with these just as they stand . . . .

Dick's letter did not state or imply that Byrums accepted the terms of Bear's offer of January 9, 1984.

Byrums never performed the conditions set forth in any of Bear's offers, either before or after January 18, 1984.

Byrums never expressed or indicated a willingness to accept the terms of Bear's offer or to make tender in accordance therewith.

Dick's letter of February 10, 1984, constituted a counter-offer to Bear and a rejection of Bear's January 9, 1984, offer, if said offer had not been previously terminated by Byrum's actions on January 18, 1984.

As of February 10, 1984, no contract or agreement had been entered into between the parties.

Throughout their Petition, Byrum argues that tender and re-tender did occur in accordance with Mr. Whitlock's instruction (Petition p.43) but gives no details, sets forth no specifics, and cites no references in the evidence for such a statement.

In the lower courts Byrum argued that they accepted Bear's December 20, 1983 offer by tendering the check and the previously rejected release on January 9, 1984, and then recording the release prepared by Whitlock on January 18, 1984, but now argues (for the first time) that the Circuit Court "never conceded nor apparently understood that here a contract in settlement and compromise formed when the parties by written letters agreed to settle" (Petition p. 35).

No specifics are set forth and no references are cited to support the existence of a contract and Byrum does not and cannot point or refer to any act or document indicating a tender or willingness to tender the sum of $3,000 to Bear in response to Bear's January 9, 1984 offer nor to any act or document tending to contradict their failure and refusal to pay on January 18, 1984, and their failure and refusal to pay on February 10, 1984.

No contract was entered into between the parties and the judgment of the Circuit Court is absolutely correct.

The decision of the Circuit Court was based on Virginia contract law and involves a strictly private matter between the parties. Rule 10.

CONCLUSION

For reasons hereinbefore set forth Byrum's Petition for a Writ of Certiorari should be denied and Respondents should be awarded double damages pursuant to Rule 42(2) of the Supreme Court.

Respectfully submitted,

LAIR DAYTON HAUGH
Counsel of Record
CHARLES R. HAUGH
HAUGH & HAUGH, P.C.
Attorneys for Respondents
435 Park Street
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(804) 296-0185

APPENDIX A — EXCERPTS: BYRUMS' BRIEF TO VIRGINIA SUPREME COURT

IN THE
SUPREME COURT of VIRGINIA
AT RICHMOND

RECORD NO. 860977

BEAR INVESTMENT COMPANY,

Appellant,

v.

BARNEY L. BYRUM and ELIZABETH Y. BYRUM,

Appellees.

APPELLEE'S BRIEF

LAW OFFICE OF J. BENJAMIN DICK
J. BENJAMIN DICK, ESQUIRE
421 PARK STREET — SUITE 2
CHARLOTTESVILLE, VIRGINIA 22901

COUNSEL FOR APPELLEES

With the January 13, 1984 motion to enforce the settlement filed by the Byrums, the Byrums gave notice that they would seek to have the motion heard on January 18, 1984. On January 18, 1984 no one apeared at the Courthouse. The Byrums and their counsel *were not notified* that Court would not be held.

* * *

Appendix A

It is entirely incorrect that "the parties made a tentative oral agreement that day" ("that day" being February 15, 1984), to agree to sign the document titled "Statement Withdrawing Allegations" relating to multiple parties and other actions unrelated to the instant matter. Mr. Whitlock was asked on the record when he had his prepared release signed what else could he possibly demand next and he announced in recess he needed $5,000.00 and an apology. The Byrums had in hand the $3,000.00 cashier's check and by counsel stated to Mr. Whitlock that this newest demand of an apology after his release had been signed and recorded, which was the last demand, would have to been seen first. Mr. Whitlock, and this counsel adjourned to Mr. Arnold's office and Mr. Whitlock only and by himself dictated the "Statement Withdrawing Allegations". On seeing it, the Byrums announced there was no way they could sign a document as wrong as the one prepared by Mr. Whitlock for them to sign. On the same day it was never represented to Mr. Whitlock that the Byrums could not pay the agreed $3,000.00, the same having been tenered two or three times to him and refused and in hand. (This counsel saw the apology as tenable but the accelerating monetary demands as unconscionable holding literally the land as hostage.) The escalating monetary demands of Mr. Whitlock, this one on February 15, 1984 being $5,000.00, were never agreed to.

* * *

4) Bear Investment by written correspondence dated December 2, 1983 to Byrums' counsel, gave 3 options, the Byrums taking the 1st one (#1) that Bear Investment would agree to dismiss the case upon payment in cash or by certified check the sum of $3,000.00. In addition, a release would have to be executed to release Bear Investment Co., W.W. Whitlock, A.G. Johnson, and W.W. Whitlock from any

cause or claim. (Joint Appendix, Vol. II, pages 506-507.)

The Byrums on December 16, 1983 had delivered to W. W. Whitlock a cashier's check for $3,000.00 and a release. (Joint Appendix Vol. II, Page 523-524.) The release states "and as W. W. Whitlock, demands in said letter, we further agree to release from all claims only the following people and legal entities so described in W. W. Whitlock's letter, namely, W. W. Whitlock Agency, Inc., E. J. Whitlock, Jr., Robert A. Whitlock, A. G. Johnson, W. W. Whitlock and Bear Investment Company." (Executed 12-13-83.)

5) Not satisfied, Mr. Whitlock demanded the words "under protest" be deleted from the check and the release as requested by his letter of December 20, 1983 to the Byrums, page two, Joint Appendix, Vol, II, page 529. In that same letter, he encloses a release "that we have prepared" and he notes he is sending a copy of the letter to Mr. Arnold to advise him accordingly. (Trustee's Counsel.).

The Byrums there upon complied and struck the words "under protest" from the release and check and tendered the same again at a scheduled hearing on January 9, 1984 to Mr. Whitlock. Mr. Whitlock refused the same saying he wanted his release signed before he would settle.

APPENDIX B — EXCERPTS: LOUISA CIRCUIT COURT PRECEEDINGS ON FEBRUARY 15, 1984

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF LOUISA

Chancery # 2317

BARNEY L. BYRUM & ELIZABETH Y. BYRUM,

Plaintiff

V

GARY PATTERSON, TRUSTEE, ET AL,

Defendants

APPEARANCES:

J. Benjamin Dick, Esquire
421 Park Street
Charlottesville, Virginia 22902
Counel for Plaintiffs

Richard W. Arnold, Jr., Esquire
P.O. Box 276
Louisa, Virginia 23093
Counsel for Defendant Patterson

W.W. Whitlock, Esquire
P.O. Box 128
Mineral, Virginia 23117
Counsel for Defendant, BEAR Investment Company

Before: F. Ward Harkrader, Jr., Judge

* * *

[20] . . . And a far as this document that surfaced in January, I'd

like to speak to that in just a moment. But going on to Mr. Whitlock, and the 16th, I went to my clients and I told them what they had to have in this letter of December the 3rd, I believe it was, and they very reluctantly signed the Release, and language in there, was put in there at their request, and they issued a check from my Trust Account with the same sort of inscripion. Mr. Whitlock was not satisfied with it, as he said. He did call me. I wasn't there. We later discussed it. He was very unhappy with the "under protest" language and so the next thing we know — we had already been here December the 9th, in front of Judge Fry, where he refused to enter an Order confirming the sale or reinstating your June 5th Order. Then we came back here on January the 9th, in a — in a Jury Room back here. I told Mr. Whitlock, "What do you want?" and "Your letter says if we strike the words, "under protest" and on the check and on this Releae, that you'll — you'll be satisfied." [21] Not on the Release, if we strike it on the check and if they sign a second release document that Mr. Whitlock drew, that he likes, and which he didn't like mine, for all the reasons that he stated, he says it's a normal form release, and when Mr. and Mrs. Byrum read this clause that they were releasing — I'll read it to you — he says this — I don't know of any general form tht has this — now, however, tht we release all these people. He names everybody in the world, and he says, "upon, or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the day of the date of these presents." Okay, well, that — that bothered the Byrums. They're educated people, but when we came to the 18th — when we came here the 9th, I had been here all morning with Mr. Arnold. We were in an amicable state of mind and I thought Mr. Whitlock would come around when we struck the words, "I under protest" on the check, and as things went in this case, they all fell for it, when I put it in my Motion about Richard being mute, . . .

* * *

APPENDIX C — EXCERPTS: LOUISA CIRCUIT COURT PROCEEDINGS ON DECEMBER 16, 1985

VIRGINIA: IN THE CIRCUIT COURT OF LOUISA COUNTY

Chancery Case Number 2319

BARNEY L. BYRUM, et al,

Plaintiffs

VS

GARY PATTERSON, Trustee, et als,

Defendants

APPEARANCES:

J. Benjamin Dick, Esquire
421 Park Street
Charlottesville, VA 22901
Counsel for Plaintiffs

Richard W. Arnold, Esquire
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Gary Patterson

W. W. Whitlock, Esquire
Post Office Box 128
Mineral, VA 23117
Counsel for Defendant
Bear Investment Company

C. Champion Bowles, Jr., Esquire
Main Street-Winston Building
Louisa, VA 23093
Counsel for Mr. Lowe

COURT PROCEEDINGS

TAKEN ON

December 16, 1985

Before: Honorable J. Henry Garnett, Judge Designate

Appendix C

* * *

[75] A That was entered by me as their counsel. We had appeared here on January 9th. The Court would not entertain, at Mr. Whitlock's request, any evidence of settlement, and the direction of the Court was that we should try to reach an order that everyone could sign by Janury 18th, and I came to the courthouse and no one was here. Judge Harkrader had fell and broken his leg. Mr. Agee was here. He had the office open. We had about 12 or 14 inches of snow, it was bitter cold, and since no one was here and the Court had indicated an order would be entered if we didn't reach Mr. Whitlock's demand of signing another release, I felt in their best interests and as their counsel I should record a notice and place it on the books.

* * *

[83] Q But you never delivered to me the release that I prepared, did you? A The lease was — I came here the 18th of January, had understood the Judge said we all had to be back here. No one was here. We recorded the release with the Clerk. Showed him your letter saying that this release had to be executed by the Byrums, and . . .

Q Why didn't you just give the release to the Clerk and tell him to give it to us, or why didn't you call my office? A I was here at court like I thought I was supposed to be. Nobody else was here, so I just gave to the Court — the Clerk so that there — there was notice . . .

Q You insisted that he record it, did you not? A Yes, I did.

Q Why did you want it recorded? A Because you wanted it signed and — and executed.

Appendix C

Q And did that mean it had to be recorded? A As you recall, Mr. Whitlock, Judge Harkrader said he would enter an order confirming the sale unless we met your demands and we met your demands on January 18th. Your new demands, and demands made after December 16th . . .

Q Well, you didn't leave any money with the Clerk. A You — we tendered the check to you two times and [84] you returned it back two times.

Q But why would you think . . . A It's not my fault that you returned it back.

Q Why would you think it important to come down here and record this document without making some arrangements about the money? A We'd given you a check twice, Mr. Whitlock, and you gave it back to us.

Q You'd also given me some release. A Well, we tried to — we tried to give you money several times and you keep handing it back to us.

Q Were the Byrums present when this document was prepared that was attached to the release and recorded? Did they take part in preparing and drawing that to, just like they did the release? A The notice?

Q Yes. A I prepared that by myself. Sat here and typed it on a typewriter.

* * *

APPENDIX D — EXCERPTS: LOUISA CIRCUIT COURT PROCEEDINGS ON APRIL 14, 1986

VIRGINIA: IN THE CIRCUIT COURT OF LOUISA COUNTY

Chancery Case Number 2319

BARNEY L. BYRUM, et al,

Plaintiffs

vs

GARY PATTERSON, Trustee, et als,

Defendants

APPEARANCES:

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Charlottesville, VA 22901
Counsel for Plaintiffs

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Gary Patterson

W. W. Whitlock, Esquire
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Mineral, VA 23117
Counsel for Defendant
Bear Investment Company

John Whitlock, Esquire
P. O. Box 128
Mineral, VA 23117

HEARING

Taken on April 14, 1986

BEFORE: Honorable J. Henry Garnett, Judge Designate

Appendix D

* * *

[27] . . . I don't remember the exact figures. Anyhow, Judge Hardrader thought we ought to try and settle it, and he gave us until January 18th to report to him whether or not there was an agreed settlement. And if there hadn't been an agreed settlement, he would enter the order that had been prepared to reinstate the previous ruling of the Court.

So we got down – I am not sure about dates – the date that we were supposed to appear here – I think it was the 18th of February, Judge Hardrader had an accident and fell and broke his leg. Court was called off. We were called and told not to come to court; that Judge Harkrader would not be here. We were not called and told that anybody would be here. I was in my office in Mineral. I didn't come to court because Court had been adjourned. Apparently Mr. Dick came here. I am not sure whether he came with his clients or not because there are some places in the record that say he did come with his clients and other places it appears to me that say he didn't. Anyhow without notice or knowledge to us, Mr. Dick came down here ap-[28]parently on that day and recorded this document, saying now that the reason he recorded it was because no one was here and he wanted to make certain that we were – we were put on notice that the Byrums had signed this release – the release that I had prepared.

But the first thing that was put on record was a letter on stationery of Bejamin Dick, signed by Bejamin Dick before a Notary, saying – says notice Elizabeth Y. Byrum and Barney L. Lyrum – and says, "Know all men who may inquire that the attached document directly pertains to land located in Louisa County, Virginia, acquired by the above purchasers from their successors - grant or their predecessors, grantors." Then it goes on

down and has this sentence in that statement, "The above submit to these demands to save their land and do so under the debt force and pressure; their land being a lifetime investment and a former creditor, John Lowe, Esquire, having been duly paid as demanded, to satisfy the Deed of Trust in bond of pain by him and a record in the Clerk's Office."

In addition to that statement, a letter from Mr. Arnold to Mr. Dick, telling him that your clients will not execute the release requested by Mr. Whitlock, and the release requested by Mr. Patterson, then it appears to me that the Judge will confirm sale of the property, so if your clients are willing to let this happen, please let me know so that the four thousand dollars ($4,000) being held in escrow by the Trustees [29] may be returned to your clients. That letter is dated January 12, 1984. All Trustee's fees and expenses of the Trustee in executing the trust will be taken out of the sales proceeds and the proceeds are paid into the trust – into the Trustee from the sale or Bear Investment Company, with the remainder of the funds to be sent to you, as attorney for Mr. and Mrs. Byrum. A copy of that went to Mr. Patterson.

THE COURT: Was that recorded?

A Yes. That was recorded as the second document in this series of papers. Then the third document recorded was the release – a similar release to the one that was sent to us, signed by the Byrums, saying that the undersign – Elizabeth and Barney L. Byrum, in consideration of the settlement suit of Byrum v. Patterson, Louisa County Chancery Number 2319 do hereby release from all claims, Gary B. Patterson, Trustee, and any person or persons employed by him in connection with this litigation, any heirs, assignees or administration of his estate whatsoever. It doesn't say anything in this one about them being forced to do it.

Appendix D

This is a reasonable release. It doesn't – then the next document is this release that I had prepared and outlines the provision that I included in my letter originally. This is shown to have been executed on January 19, 1984, the same day that these documents were recorded. We had no notice that this release had been signed. [30] We had no notice that was put on record. In fact the only way that we ever learned that all this mess was put on record was when Mr. Arnold happened to be checking the Deed Books in the Clerk's Office and read all of this business.

But in addition to this release being included in the documents, another statement was put in, said Notice and Affidavit. Know all ye that the annexed hereto recorded in the Clerk's Office of the Circuit Court of Louisa County, as it relates to the land of Elizabeth and Barney Byrum, located in Louisa County, a true and accurate copy of Elizabeth Byrum and Barney Byrum, execute a release in favor of W. W. Whitlock, Bear Investment Company and others. A receipt executed in favor of Elizabeth Byrum and Barney Byrum, by the former clients and office of John C. Lowe, and a copy of the cashier's check, front and back, represent cash money from the Byrums to the Trustee, Gary Patterson, for his expenses – and fees – as signed by J. Benjamin Dick, before a Notary.

And then in addition to the release that they recorded, that was the one we asked – they recorded the release that they had prepared that we said was not acceptable. And this is on page 567 of the same Deed Book, 272 - first one was recorded on page 561. And this again says, and this is the release that first said that they do under protest pay to the purchaser of the land, at the forced auction on November 19th. This has been marked out and the words, "Do agree under [31] protest" has been marked out and inserted above it – is added "are forced" – so that it read, this change was made on January 9, 1984 – so that it read then, "We are forced to pay the

purchaser of our land at the forced aution on November 19, 1979, so ordered by John Lowe and his fellow attorneys working for him" was still left in there.

This again, was an insulting statement to us because – a degrading statement to us and was not what we wanted or was appropriate to comply with our request for a settlement. We were given – I urged and pleaded with Bear Investment Company to give up their rights to this land, to try to make these people happy. And it was agreed by Bear Investment Company, that it would make them happy, if they will think that they haven't been done wrong and will know – see that we are trying to help them, then we will be willing to give it up; otherwise no reason to give up something that they had spent hours and a lot of money looking at it, determining whether or not it would be something they would be interested in buying, and then buying it and going through a lot of hassle connected with the buying of it.

But anyhow – then another document is the check showing that Mr. Patterson had cashed his four thousand dollar ($4,000) check. And on that check it shows that the words "Under Protest Payoff" was inserted and was still there apparently when the check was cashed.

* * *

[50] Q Was it not a fact that Judge Harkrader said by January 18th we had to come to an agreement with you, and your agreement was that we had to sign the release that you prepared by January 18th? A Our agreement was that you had to execute the release that I had prepared, without it being under protest, [51] it being a voluntary act on your part . . .

Appendix D

Q Okay . . . A And it had to be accompanied by certified check the amount of money tht you were supposed to pay.

Q Wasn't it executed on the 18th? A I find that you recorded it, along with other documents that I . . .

Q All right. You stated . . . A Wait a minute, let me finish, sir.

Q Yes, sir. A That I think put a cloud on the voluntary act of the release when you prefaced it with a statement, saying that you are doing it under force, and then showing another release that you have prepared, showing that that was done under force or under protest. If you wanted to record the release, that would have settled this case – although, I don't know why you wanted to record it – all you had to do was call me or come to my office and we could have cleared it out. But if you wanted to record it, you could have recorded the release that we sent and left the check with the Clerk or sent a check to our office to pay the money. You didn't do either of those.

* * *

APPENDIX E — NOTICE RECORDED BY BYRUM WITH OTHER DOCUMENTS ON JANUARY 18, 1984

BOOK 272 PAGE 581

J. BENJAMIN DICK
ATTORNEY AT LAW
421 PARK STREET
CHARLOTTESVILLE, VIRGINIA 22901
(804) 977-6607

[* Recorded January 18th 1984]

Nicholas P. Jellins, Esq.

NOTICE
(Elizabeth Y. Bryum and Barney L. Byrum)

KNOW ALL YE who may inquire that the attached documents directly pertain to land located in Louisa County, Virginia, Jackson Magisterial District acquired by the above purchasers from William Katsche and Mary C. Katschke, by instrument of deed dated October 2, 1956, Deed Book 96, Page 282, of the Clerk's Office of the Circuit Court of Louisa County, Virginia and that the documents annexed hereto arise from and out of demands made upon the above persons by written request of W. W. Whitlock Esq. personally and for others and by written request of R. W. Arnold, Esq. for Gary Patterson, Trustee, in order to prevent the transfer of the aforesaid land to Bear Investment Company by Court Order demanded by them and which transfer by Order of the Circuit Court was clearly indicated on the record would occur unless these demands of releases to gain the signature of W. W. Whitlock on a previously submitted Settlement Order endorsed by all counsel in the matter of Byrum v, Patterson et.al. save W. W. Whitlock submitted January 9, 1984 in open Court. The above submit to these demands to save their land and do so

under that force and pressure, their land being a lifetime investment and a former creditor, John C. Lowe, Esq. having been duly paid as demanded to satisfy the deed of trust and bond obtained by him and of record in the said Clerk's Office.

s/ J. Benjamin Dick
Of Counsel

STATE OF VIRGINIA
AT LARGE, to-wit:

Subscribed, sworn and acknowledged before me this 18th day of January, 1984 by J. Benjamin Dick.

My commission expires: February 21, 1987.

APPENDIX F — LETTER: DICK TO WHITLOCK DATED FEBRUARY 10, 1984

J. BENJAMIN DICK
ATTORNEY AT LAW
421 PARK STREET
CHARLOTTESVILLE, VIRGINIA 22901
(804) 977-6607

Nicholas P. Jellins, Esq.

February 10, 1984

CERTIFIED MAIL
P14 8108376

W.W. Whitlock, Esq.
Attorney at Law
Post Office Box 128
Mineral, VA 23117

Dear Mr. Whitlock:

Enclosed is a true copy of the Release duly recorded and executed January 18, 1984, that you demanded be executed before a Notary Public. This was done January 18, 1984, the date scheduled for a hearing. The original is in my hands and I will file it with the Court.

As a lawyer, I think you have a certain duty to endorse the Order signed by all other counsel and moreso due the fact that your demanded release is executed. Mr. and Mrs. Byrum have given you every demand, particularly this second demanded release drawn by your own hand that offended them greatly. To save their land, they signed it.

Appendix F

As I have tendered the $3,000.00 check twice and you have given it back to me twice, I feel you do not want the money and I think your action to not take the money would be gracious. The Byrums certainly need the money far worse as they are over-ridden with many other financial and human hardships that this matter has not helped at all and if anything has greatly increased their distress.

You wanted the release you drew, you have it. Please allow these poor people to go on, let the land alone, and if there is any divine justice, a day of reckoning shall be their only reprieve to the considerable unfortunate, mental stress, and harm that they have bravely endured in this matter through the years and more recently.

Enclosed is my letter to Judge Harkraker whom I have implored to end this matter if you can not make the trip to the Clerk's Office and sign your endorsement to the Order that all other counsel have signed before February 15, 1984. Please advise me if you do finally endorse the Order that is lodged with the record in the Clerk's Office.

I thank you and request your prompt professional attention and human empathy to end this matter.

Respectfully,

s/ J. Benjamin Dick

J. Benjamin Dick
Of Counsel

APPENDIX G — STATEMENT WITHDRAWING ALLEGATIONS PREPARED BY WHITLOCK ON FEBRUARY 15, 1984

VIRGINIA:

IN THE CIRCUIT COURT OF LOUISA COUNTY

Chancery No. 2319

BARNEY L. BYRUM, ELIZABETH Y. BYRUM,

Plaintiffs

vs.

GARY B. PATTERSON, Trustee, et als,

Defendants

STATEMENT WITHDRAWING ALLEGATIONS

WHEREAS the plaintiffs have filed documents in the clerk's office of the Circuit Court of Louisa County in Deed Book 272, Page 561 and along with other documents containing allegations involving this litigation, and

Whereas, Plaintiffs have given further considerattion to their allegations stated in said documents, and now by their own voluntary acts and at their own request do hereby make the following statement.

We acknowledge that the allegations made in the documents recorded in said clerk's office, other than the general release,

Appendix G

contain allegations that were untrue and we now wish to withdraw all of said allegations and we further wish to withdraw a motion filed on our behalf in this suit headed "Amended Motion to Enforce Settlement", and we hereby apologize to Richard W. Arnold, Jr., Gary B. Patterson, W. W. Whitlock, A. G. Johnson, Robert A. Whitlock, E. J. Whitlock, Jr., and W. W. Whitlock Agency Inc. and all parties connected therewith for allegations we have made in these proceedings and in other law suits filed in the City of Charlottesville, we now understanding that such allegations are untrue and incorrect.

We make this statement voluntarily and understand that we are not required to make this statement other than as our own desire.

We further will cause this document to be recorded in the clerk's office of Louisa County as in evidence of the cancellation of the previous notice and statements recorded in said clerk's office.

Given under our hand this 15th day of February, 1984.

_____

ELIZABETH L. BYRUM

_____

BARNEY Y. BYRUM

Appendix G

STATE OF

CITY/COUNTY OF _____, TO-WIT:

I, _____, a Notary Public in and for the jurisdiction aforesaid, do hereby certify that

_____

whose names are signed to the above writing, have this day personally appeared before me and acknowledged the same in my jurisdiction as aforesaid.

My commission expires: _____.

Given under may hand this _____ day of _____, 198 .

_____
Notary Public